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NO. 03-836

IN THE SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF COLORADO,

PETITIONER,

vs.

WADE MILLER,

RESPONDENT.

On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Colorado court misapplied the staleness doctrine of the Fourth Amendment in finding that evidence concerning an ongoing drug manufacturing operation was "stale" because it was almost one month old.

2. Whether the Colorado Supreme Court eviscerated Leon by finding that the good faith exception to the exclusionary rule generally does not apply when an appellate court finds, under Gates, that there was an insufficient basis for the warrant.

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OPINION BELOW

The Colorado Supreme Court opinion, which is attached as Appendix A, has been reported as People v. Miller, 75 P.3d 1108 (Colo. 2003). The search warrant and its affidavit, and the trial court's order suppressing the evidence seized pursuant to the warrant are attached as Appendices B and C.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1257(a). This petition involves an interlocutory appeal of an order suppressing evidence seized by law enforcement officers who were executing a search warrant that had been approved by a judge. The Colorado Supreme Court affirmed the trial court's suppression order on September 8, 2003. No petition for rehearing is permitted in such cases under Colorado appellate rules. Colo. R. App. P. 4.1(g).

CONSTITUTIONAL PROVISIONS

Amendment IV provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Amendment XIV, section 1 of the United States Constitution provides, in pertinent part: "Nor shall any state deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE FACTS

Wade Miller faces Colorado felony charges for possessing and operating two separate methamphetamine laboratories within Fremont County, Colorado, on January 6, 2003. These laboratories were located at Miller's residence at 406 Riverside, Canon City (Riverside), and at his friend Jacob Lopez' mobile home located at 926 Orchard, Unit C, in unincorporated Fremont County (Orchard).

Based on information from fellow officers and several informants that Miller and Lopez had been manufacturing methamphetamine at both locations as recently as a month before the affidavit was prepared, officers from the Canon City Police Department (Officer Andrew Lopez) and the Fremont County Sheriff's Department (Deputy Mike Jolliffe) obtained search warrants for both the Riverside and Orchard addresses.[1]

Both warrants were signed by Fremont County Judge William Fox on January 6, 2003. The search warrant for the mobile home at 926 Orchard was executed on January 6, 2003, and police found items consistent with manufacturing methamphetamine. The search warrant for Miller's residence at 406 Riverside was executed later the same day, and yielded a "cold" methamphetamine laboratory in the residence. Miller was present in his residence when the search warrant was executed and was thereafter taken into custody.

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[1] The search warrant affidavits for the Riverside and Orchard locations were substantially the same. Inexplicably, the Orchard affidavit contained an additional bit of information about the Riverside location that was more current than what was provided in the affidavit at issue here. See Miller, 75 P.3d at 1111.

STAGE IN THE PROCEEDINGS AT WHICH THE FEDERAL QUESTION WAS RAISED

Prior to trial, Miller moved to suppress the fruits of the Riverside search. The district court granted the motion, finding that the underlying affidavit failed to establish probable cause because it was based on stale information. The trial court further declined to apply the good faith exception to the exclusionary rule.

THE DECISION OF THE COLORADO SUPREME COURT

On interlocutory appeal, the Colorado Supreme Court affirmed the suppression order. Miller, 75 P.3d 1108 (Pet. App. A). The Court concluded that the information provided in the affidavit for the search warrant was "stale" and thus insufficient, Id. at 1115, and held that the good faith exception to the exclusionary rule under Leon did not apply because no reasonable officer would have relied on a warrant based on such stale information. Id. at 1116-1117. Three justices vigorously dissented, arguing that the information at issue was not stale given the ongoing nature of Miller's methamphetamine manufacturing activities, and that, in any event, the officers relied on the warrant in good faith, and thus the evidence at issue should be admissible. Id. at 1117-1119.

REASONS TO ISSUE THE WRIT SUMMARY OF THE ARGUMENT

This Court's decisions in Illinois v. Gates, 462 U.S. 213, 236 (1983), and United States v. Leon, 468 U.S. 897 (1984), made substantial changes in Fourth Amendment doctrine. Because Colorado has been reluctant to embrace these changes, and because this reluctance is impacting the ability of Colorado law enforcement agencies to combat a proliferation of methamphetamine-manufacturing sites, this

Court should review the Colorado Supreme Court's opinion in Miller.

In Gates, this Court abandoned the highly technical, two-pronged Aguilar-Spinelli[2] analysis for determining probable cause, and returned to a more practical and common sense totality-of-the-circumstances approach. In Leon, this Court recognized a good faith exception to the exclusionary rule, under which evidence obtained by police acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate, but ultimately found to be unsupported by probable cause, would not be barred from use at trial.

In spite of these significant changes in Fourth Amendment law, the Colorado Supreme Court has provided little guidance to the Colorado law enforcement community regarding what is necessary to establish probable cause in the investigation of continuing illegal enterprises, and whether, notwithstanding allegedly debatable probable cause, a search may nonetheless be held valid because the officers conducting it were acting in good faith. In the past ten years, the Colorado Court has issued inconsistent opinions which have muddied the waters of probable cause and unduly restricted the application of the good faith exception. Compare, e.g., People v. Gall, 30 P.3d 145 (Colo. 2001) (search upheld notwithstanding errors in affidavit) and People v. Altman, 960 P.2d 1164 (Colo. 1998) (affidavit defective, but good faith exception applied), with People v. Randolph, 4 P.3d 477 (Colo. 2000) (search invalidated because of insufficient specificity in warrant; no good faith exception) and People v. Leftwich, 869 P.2d 1260 (Colo. 1994) (search invalidated; no good faith exception). These decisions conflict not only with each other, but also with

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[2] Aguilar v. Texas, 378 U.S.108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969).

decisions from many other courts that have properly applied the holdings of Gates and Leon.

Dealing as it does with the growing national problem of methamphetamine-manufacturing, this case provides a fitting opportunity for this Court to clarify for courts throughout the country how the concept of staleness relates to probable cause and continuing enterprises, and, at the same time, to clarify the relationship of Gates to the good faith exception to the exclusionary rule under Leon.

The Colorado Court's approach to staleness and its inconsistent view of the applicability of the good faith exception exacts an unjustifiable cost to society. Reliable evidence of criminal culpability is often kept from the fact-finder through an overly rigid approach to the determination of probable cause, and officers acting in good faith are penalized because of an inappropriately aggressive application of the exclusionary rule, potentially leading to the dismissal of criminal cases. Miller holds that, if a bare majority of the highest court concludes there is no probable cause, then necessarily no reasonable police officer could have thought otherwise (notwithstanding that the trial judge who issued the Miller warrant and three state Supreme Court justices thought the affidavit was sufficient). The Writ should issue to correct the Colorado Court's unrealistic view of "staleness," and to correct its often-inconsistent approach to probable cause and good faith under Gates and Leon.

ARGUMENT

I. Whether the Colorado court misapplied the staleness doctrine of the Fourth Amendment in finding that evidence concerning an ongoing drug manufacturing operation was "stale" because it was almost one month old.

In Gates, this Court rejected the Aguilar-Spinelli standard and returned instead to the "totality of the circumstances analysis that traditionally has informed probable-cause determinations." Gates, 462 U.S. at 238. Gates refocused the determination of probable-cause into a common sense, practical inquiry: "[t]he focus should be on 'probabilities' which are 'not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" Gates, 462 U.S. at 230-231.

This Court emphasized in Gates that "probable cause is a fluid concept -- not readily, or even usefully, reduced to a neat set of legal rules...The essential protection of the warrant requirement of the Fourth Amendment ... is in 'requiring that [the usual inferences which reasonable people draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" Gates, 462 U.S. at 240.

The probable cause/staleness analysis employed by the Colorado Supreme Court in Miller is in stark contrast to the common-sense approach established by this Court in Gates. While the Miller Court paid lip service to the practical principles set forth in Gates and adopted by Colorado in People v. Pannebaker, 714 P.2d 904 (Colo.

1986), it ignored the totality of the circumstances and applied an idiosyncratic, erroneous evaluation of staleness.

The Colorado Supreme Court dissected the information upon which the judge had approved the warrant and summarily rejected the affidavit as based on "stale" information. Instead of considering whether the information as a whole "warrant[ed] suspicion" or demonstrated the "probability" of ongoing criminal activity at Miller's Riverside address, the Court imposed a rigid (and apparently arbitrary) time line for determining probable cause. The Court thereby rejected the "nontechnical and common sense judgments" which this Court has said should underlie probable cause determinations for both police and magistrates. Gates, 462 U.S. at 235-236.

Here, under the totality of the circumstances, there was a substantial basis upon which the judge issued the warrant. Officer Lopez' probable cause affidavit for the search of 406 Riverside established a nexus between Miller's criminal activity (manufacturing methamphetamine) and his residence at 406 Riverside. Miller had been arrested on August 14, 2002, after a search of the residence yielded a "meth lab." On that same day, Officer Lopez arrested Miller's friend, Jacob Lopez, after Jacob Lopez approached Miller's residence with methamphetamine and drug paraphernalia on his person. Miller was free on bond at the time of the January 2003 search, but had reportedly been continuing his manufacturing activities with Jacob Lopez both at his own home, and at Lopez' mobile home. Pet. App. B.

The Colorado Court did not, however, consider the totality of these circumstances. Instead, the Court summarily rejected the warrant on the ground that the most recent information in it was almost a month old and therefore

"stale." The Court applied a technical, legalistic analysis, not a practical one based on a common sense approach to probability.

This case presents a significant issue concerning the staleness doctrine of the Fourth Amendment as it applies to the investigation of continuing criminal enterprises, in particular, the manufacture or production of controlled substances. Although mentioned in passing in only a few of this Court's cases (but addressed as a significant issue in many lower court opinions), this Court has yet to provide guidance to the lower courts on when information contained in a warrant affidavit becomes so stale as a matter of federal constitutional law that it cannot be considered in support of a probable cause to search determination. In light of the increasing use of chemical processes to manufacture controlled substances,[3] this is an issue of current and continuing legal concern that merits this Court's consideration.

The only significant guidance this Court has ever provided on the issue of when evidence is so stale that it cannot be used to find probable cause occurred more than seventy years ago in Sgro v. United States, 287 U.S. 206 (1932). In Sgro, concerning the search warrant provision of the National Prohibition Act, this Court wrote:

> While the statute does not fix the time within which proof of probable cause must be taken

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[3] See Drug Enforcement Administration, Intelligence Report, "Chemical Diversion and Synthetic Drug Manufacture" (Jan. 2002) available at http://www.usdoj.gov/dea/pubs/intel/intel010621.html).

> by the judge or commissioner, it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case.

Id. at 210-11 (emphasis added).

Since then, this Court has addressed search warrant staleness claims only in passing, without providing any guidance to the lower courts on how to address the issue. See Andresen v. Maryland, 427 U.S. 463, 478 n. 3 (1976); United States v. Harris, 403 U.S. 573, 579 n.* (1971); Berger v. New York, 388 U.S. 41, 59 (1967).

Lower courts, on the other hand, address claims concerning the staleness of search warrants on a frequent basis. See 2 Wayne R. LaFave, Search & Seizure, § 3.7(a), pp. 338-355 (3d ed. 1996 & 2004 Supp.); Annotation, When are Facts Offered in Support of a Search Warrant for Evidence of Sale or Possession of Cocaine so Untimely as to be Stale—State Cases, 109 A.L.R.5th 99-160 (2003) ; Annotation, Search Warrant: Sufficiency of Showing as to Time of Occurrence of Facts Relied On, 100 A.L.R.2d 525-544 (1965).

Inexplicably, the Colorado Supreme Court held that "nearly a month" delay between the last time the informant reported that the defendant had manufactured methamphetamine in his residence and the search warrant application for that location rendered the informant's report stale as a matter of federal constitutional law, characterizing

it as an "excessive delay . . . [that] renders the information stale and unreliable." Miller, 75 P.3d at 1114.

Federal circuit courts of appeals and state courts of last resort faced with longer --sometimes substantially longer -- periods of time between affidavit evidence and warrant applications have rendered decisions that conflict with the one in this case. They hold that when the crime at issue involves the investigation of conspirators involved in the clandestine production of controlled substances involving lengthy investigation, "staleness arguments lose much of their force." United States v. Leasure, 319 1092, 1099 (9th Cir. 2003) (meth lab information that was six months old was not stale); United States v. Ruff, 984 F.2d 635, 638 (5th Cir. 1993) (meth lab information that was two and a half months old was not stale); United States v. Sturmoski, 971 F.2d 452, 456-57 (10th Cir. 1992) (meth lab information that was six months old was not stale); Caucon v. United States, 824 F.2d 9089, 911 (11th Cir. 1987) (meth lab information that was eleven months old was not stale); Lovett v. Commonwealth, 103 S.W.3d 72, 80 (Ky. 2003) (meth lab information that was two months old was not stale); State v. Baker, 103 S.W.3d 711, 720 (Mo. 2003) (meth lab information that was fourteen months old was not stale); State v. Hage, 568 N.W.2d 741, 744 (N.D. 1997) (meth lab information that was four months old was not stale).

The three dissenting justices of the Colorado Supreme Court urged the court to follow that line of reasoning. See Miller, 75 P.3d at 1118-19 (Coats, J., dissenting). As the dissent observed, "The majority's decision to limit the life-span of probable cause to a set number of days following the last information of drug manufacturing at a particular location is not only contrary to our prior holdings but fails to appreciate the significance of being a continuing and ongoing operation." Id. at 1119. The Colorado Supreme Court decision in this case thus conflicts

with decisions of other state courts of last resort and with decisions of United States courts of appeals. See Sup. Ct. R. 10(b).

This Court wrote in Gates that, when determining the existence of probable cause,

> [a] grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches pursuant to a warrant; courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than commonsense manner.

Gates, 462 U.S. at 236. The Colorado Supreme Court's opinion in this case reflects a grudging, negative, hypertechnical standard of review for probable cause determinations that is at odds with the standard set forth in Gates. The decision in this case thus conflicts with a relevant decision of this Court. See Sup. Ct. R. 10(c).

The Miller decision also forces Colorado law enforcement officers conducting complex drug manufacturing/conspiracy investigations tc seek warrants shortly after receiving information of criminal activity from informants. Here, although the Miller Court recognized that the investigating officers were collecting evidence concerning other aspects of the defendant's methamphetamine manufacturing scheme during the "nearly a month delay," Miller, 75 P.3d at 1115, the Court factored the officers' painstaking investigation against the validity of the warrant they sought. Miller thus effectively penalizes law enforcement officers for seeking evidence from multiple

sources and conducting meticulous investigations that could confirm, or possibly refute, information provided by informants.

The time needed to conduct complex investigations into possibly wide-ranging drug production organizations -- investigations that are sometimes conducted by local law enforcement agencies with limited resources -- should reasonably cause staleness claims to be predicated on extremely long periods of time, periods much longer than the "nearly a month" delay held to violate the Fourth Amendment in this case. The result of the Colorado Supreme Court's ill-advised decision in this case will be to hinder legitimate investigations into complex drug manufacturing conspiracies and to reduce the fact-finding accuracy of criminal trials. This Court should grant certiorari review on this issue to correct this significantly inappropriate probable cause analysis.

II. Whether the Colorado Supreme Court eviscerated Leon by finding that the good faith exception to the exclusionary rule generally does not apply when an appellate court finds, under Gates, that there was an insufficient basis for the warrant.

In Leon, this Court continued its common sense modification of search and seizure law by holding that court-created rules requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment[4] should be modified to allow for the admission of evidence

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[4] Mapp v. Ohio, 367 U.S. 643 (1961), and Weeks v. United States, 232 U.S. 383(1914).

obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

Because the exclusionary rule is designed to deter constitutional violations by the police, there is generally no police illegality (and thus nothing to deter) when an officer acting with objective good faith executes a search warrant issued by a neutral magistrate. As such, this Court recognized in Leon that excluding the evidence so obtained does not "further the ends of the exclusionary rule in any appreciable way." Leon, 468 U.S. at 920.

The Court did not, however, open a Pandora's box of constitutional violations with this new pronouncement. Even under this relaxed standard, this Court recognized four situations where an officer's reliance on a warrant would not be objectively reasonable and therefore not in good faith:

- where a facially sufficient affidavit is based upon knowingly or recklessly made falsehoods;
- where the issuing magistrate wholly abandoned his judicial role;
- where the warrant is so lacking in specificity that the officers could not determine the place to be searched or the things to be seized; and
- where the affidavit is so lacking in indicia of probable cause that official belief in its existence is unreasonable, i.e., the affidavit is a "bare bones" affidavit.

Leon, 468 U.S. at 923.

In Miller, the Colorado Supreme Court misapplies the fourth of these exceptions. The Miller court relied on the dissent in Leon (and not on the majority opinion) to

intermingle the Gates standard for reviewing a probable cause determination with Leon's holding that the good faith exception to the exclusionary rule cannot apply if an affidavit is "bare bones." The Court then made a titanic leap in reasoning, concluding that "in the vast majority of cases, if a court [applies Gates and] finds a lack of probable cause, the court will reach the conclusion that the officer unreasonably relied on the affidavit." Miller, 75 P.3d at 1115-1116, citing People v. Leftwich, 869 P.2d 1260, 1271, n. 12 (Colo. 1994). This conclusion is completely contrary to the reasoning and holding of Leon itself, in which this Court repeatedly emphasized that suppression will rarely be appropriate when a search is done pursuant to a warrant that is subsequently invalidated.

Under the Colorado Court's approach, the suppression of evidence, which was to be rare and unusual under Leon, will be the norm whenever a previously-approved search warrant is invalidated – even where, as here, reasonable minds differ on the sufficiency of the underlying affidavit.

The probable-cause prong of the good faith analysis presupposes a situation in which a warrant approved by a judge is subsequently found lacking in probable cause. Because it is axiomatic that there must be a probable cause issue before the good faith exception comes into play, it cannot also be, as the Miller Court said, that in "the vast majority of cases" that very same failure to establish probable cause almost automatically makes the good faith exception inapplicable. Miller, 75 P.3d at 1115-1116.

The Miller Court rejected the good faith exception because "the affidavit in this case is a 'bare bones' affidavit regarding the existence of the crucial link between the place

to be searched and current information of criminal activity or the presence of contraband there." Miller, 75 P.3d at 1116. The Court found further that "the police did not reasonably rely on the warrant" because "[a] reasonably well-trained police officer is held to know that an affidavit without any relatively current information of illegal activity or the presence of contraband at a residence does not create probable cause to search the residence." Id. at 1116.

The Miller Court erroneously equated an allegedly defective probable cause affidavit with a "bare bones" affidavit. "Bare bones," however, has a far narrower meaning. An appellate court reviewing the reasonableness of an officer's reliance upon a search warrant must examine the underlying documents to determine whether they are devoid of factual support. United States v. Tisdale, 248 F.3d 964, 972 (10th Cir. 2001).

The test for "reasonable reliance" is whether the underlying documents are "devoid of factual support, not merely whether the facts they contain are universally recognized as legally sufficient." United States v. McKneely, 6 F.3d 1447, 1454 (10th Cir. 1993). It is only when an officer's reliance was wholly unwarranted that good faith is absent. United States v. Cardall, 773 F.2d 1132, 1133 (10th Cir. 1985).

"Leon has established for judicial consideration a framework for judging law enforcement activity which leads to a more precise application of the exclusionary rule. Leon balances individual rights with the equally important right of the public to bring to justice those who transgress the law. The balancing is predicated upon the concern that 'indiscriminate application of the exclusionary rule ... may well generat[e] disrespect for the law and the administration of justice' ... As a consequence of this concern, the Court

has mandated restraint upon exclusion of evidence to the end that evidence be suppressed only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." Cardall, 773 F.2d at 1132-1133. "Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." Leon, 468 U.S. at 92.

"[P]olice officers should be entitled to rely upon the probable-cause determination of a neutral magistrate when defending an attack on their good faith for either seeking or executing a warrant" particularly where, "with the benefit of hindsight and thoughtful reflection, reviewing judges still cannot agree on the sufficiency of the affidavit." United States v. Hove, 848 F.2d 137, 139 (9th Cir. 1988) ("The test for reasonable reliance is whether the affidavit was sufficient to 'create disagreement among thoughtful and competent judges as to the existence of probable cause.'"). McKneely, 6 F.3d at 1454-1455, quoting Leon, 468 U.S. at 926). That principle is squarely at issue here, where the judge who issued the warrant and three justices of the Colorado Supreme Court found that the affidavit established probable cause.

It is the role of the neutral magistrate, not the police, to make the ultimate probable cause determination. However, that is a determination on which reasonable people can frequently differ. Leon, 468 U.S. at 914 (citations omitted). It therefore makes no sense to suppress evidence and let the criminal go free in a situation where reasonable (and frequently highly-trained) minds can differ on whether facts rise to the level of probable cause. To suppress the use of reliable inculpatory evidence, even though law enforcement authorities acted as carefully as they did here, can only serve to promote more hasty action in the future in order to avoid the specter of staleness – often sacrificing the

benefits to be gained by a complete and thorough investigation.

Here, in addition to the significant information contained in the affidavit, other information available to the trial court and the Colorado Supreme Court clearly established that the investigating officers were acting in good faith. A comparison of the probable cause affidavits for the Orchard and Riverside locations clearly reflects that the two officers shared information and worked together in composing their affidavits. The officers executed the search warrant for Miller's Riverside residence only after they had conducted the Orchard search and seizure, and after they found items consistent with manufacturing methamphetamine that corroborated the statements of the informants.

The ongoing police investigation into Miller's activities, when viewed under the totality of the circumstances, supported the officers' belief (and the issuing judge's conclusion) that Miller was manufacturing methamphetamine at his home and at other locations in January 2003. It was thus reasonable to infer that evidence of methamphetamine production would likely be found in Miller's house. Miller, 75 P.3d at 1118 (Coats, J. dissenting). Thus, even assuming arguendo that the affidavit at issue failed to establish probable cause, the good faith exception recognized in Leon should have applied.

CONCLUSION

As the dissenting justices noted, "the Fourth Amendment has never been construed to assign a life-span to information disclosing the commission of a crime" particularly where, as here, the case involves criminal activity of a protracted or continuous nature. Miller, 75 P.3d at 1117, Coats, J. dissenting. Courts throughout the country

routinely rely on information several months old in upholding convictions in cases involving ongoing drug sales and production. Id. at 1118, Coats, J. dissenting. Unless police have the opportunity to conduct long-term investigations into ongoing drug manufacturing operations -- and to rely on the cumulative information gathered in those operations without fear that information gained early in the investigation might be found to be "stale" -- law enforcement authorities will be severely hampered in their efforts to stop such activities.

The inconsistency with which the Colorado Supreme Court has applied both Gates and Leon has had a drastic effect on the determination of the validity of search warrants and on the application of the exclusionary rule in Colorado. The result is a continuation of the overly-technical approach to probable cause which this Court found inappropriate in Gates, compounded by the application of the exclusionary rule under circumstances which this Court found inappropriate in Leon. This will hamper law enforcement investigations into ongoing offenses, and lead to the dismissal of criminal cases in spite of possession of reliable incriminating evidence and in spite of the lack of any deterrent effect of that drastic remedy on the police.

The writ should issue to review and correct these errors, and thereby prevent the substantial social costs exacted by the Colorado Supreme Court's approach to staleness, probable cause, and the exclusionary rule. This 4-3 decision has far-reaching impact on the ability of Colorado law enforcement authorities to investigate ongoing criminal activity, and on the applicability of the good-faith exception to the exclusionary rule when officers act pursuant to a facially valid warrant.

Respectfully submitted,

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APPENDIX A

SUPREME COURT, STATE OF COLORADO Two East 14th Avenue Denver, Colorado 80203 Interlocutory Appeal from the Fremont County District Court, Case No. 03CR11 Honorable Julie G. Marshall, Judge	Case No. 03SA107
Plaintiff-Appellant: THE PEOPLE OF THE STATE OF COLORADO, v. **Defendant-Appellee:** WADE PAUL MILLER.	
ORDER AFFIRMED EN BANC **September 8, 2003**	

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JUSTICE HOBBS delivered the Opinion of the Court.
JUSTICE COATS dissents, and JUSTICE KOURLIS and

JUSTICE RICE join in the dissent.

In this interlocutory appeal, filed pursuant to C.A.R. 4.1 and section 16-12-102(2), 6 C.R.S. (2002), the prosecution appeals the district court's order suppressing evidence of methamphetamine manufacture seized from defendant Wade Miller's home. Nearly a month expired between the event the informant related and application by the police for the warrant. The trial court set aside the warrant for lack of probable cause and suppressed the evidence seized--for lack of good faith police reliance on the sufficiency of the warrant--because the only information linking the illegal activity to the place to be searched, Miller's home, was stale. We agree with the trial court and affirm its suppression order.

I.

On January 6, 2003, the police obtained and executed a search warrant for Miller's home. During the search, the police discovered a methamphetamine laboratory, arrested Miller, and charged him with possessing and operating the lab.1

The warrant was based on a police affidavit reciting information from an anonymous informant. The informant

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1 Based on the search of his home, the Amended Information charged Miller with manufacturing a schedule two controlled substance, possession of manufacturing chemicals or supplies, possession of a schedule II controlled substance, and unlawful possession of a schedule II controlled substance. § 18-18-405(1),(2)(a), 6 C.R.S. (2002). The prosecution also charged Miller with identical counts, based on the search of the residence of Miller's friend. The validity of this other search warrant is not before us.

said that, on December 9, 2002, at Miller's home, he smoked some methamphetamine Miller had just finished manufacturing there. The informant also stated that Miller kept methamphetamine manufacturing supplies in his kitchen cabinets. The affidavit also recited another informant's information--current at the time of application for this warrant on January 6, 2003--that Miller was manufacturing methamphetamine at a location other than his home. But the affidavit (attached as Exhibit A) contained no information more current than December 9, 2002,2 regarding manufacture or the presence of contraband at Miller's home.

The record made at the suppression hearing discloses that the police obtained and executed warrants for the other location and Miller's home on January 6, but the affidavit for search of the other location inexplicably contains more current information regarding manufacture of the drug by Miller at his home than was contained in the affidavit for search of his home.

As to the affidavit for search of Miller's home, the trial court found that: (1) the police had recited sufficient reliable information to implicate Miller in the manufacture of methamphetamine; (2) but the information regarding drug manufacturing by Miller at his home was stale; and (3) the police could not have reasonably relied on it in applying for the warrant. The trial court concluded that the warrant lacked probable cause, and the good faith exception to the exclusionary rule did not apply because no reasonably

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2 On August 14, 2002, the police previously searched Miller's home pursuant to a warrant and seized evidence of methamphetamine manufacturing there.

objective police officer would have relied on the warrant's sufficiency. It therefore granted Miller's motion to suppress the evidence obtained from search of his home.

II.

We agree with the trial court that the warrant in this case was not based on probable cause, and the police could not have reasonably relied on it, because the information regarding drug manufacturing at Miller's home was stale when the police applied for the warrant, and no reasonable police officer would have relied on it. Accordingly, the exclusionary rule operates in this case, not the good faith exception to it.

A. Deficient Warrant and the Good Faith Exception

When reviewing a suppression order, we defer to the trial court's findings of facts, if supported by the record; and we review the trial court's legal conclusions de novo. People v. Schall, 59 P.3d 848, 851 (Colo. 2002); People v. D.F., 933 P.2d 9, 13-14 (Colo. 1997).

We address this case using the framework set forth by People v. Randolph, 4 P.3d 477, 482 (Colo. 2000), and People v. Altman, 960 P.2d 1164, 1167 (Colo. 1998). Randolph upheld a trial court's suppression order because the warrant there lacked probable cause and the police, under the circumstances in that case, could not have reasonably relied on it. In contrast, Altman applied the good faith exception and allowed the evidence to be admitted at trial, even though it was derived from execution of a warrant that may have lacked probable cause.

The application for the warrant in Randolph failed to particularize the building where the evidence of illegal

activity might be found; pertinent here, the anonymous tip received in that warrant was stale (two months old). We concluded that the police could not have reasonably believed that the "bare bones" affidavit they presented to the magistrate in that case established probable cause.

In contrast, the affidavit in Altman contained recent information the police had personally observed, suggesting a reasonable inference that the defendant was growing marijuana in his home.

> Officer Landolt's experience and training led him to believe that the purchase of equipment commonly associated with indoor marijuana cultivation at the height of the outdoor growing season, the high electrical usage, the potentially suspicious use of a rental car, and the defendant's previous brushes with the law all created a reasonable inference of marijuana cultivation.

Altman, 960 P.2d at 1172. Though the warrant may have lacked probable cause, an issue we did not reach because of the applicability of the good faith exception, we concluded that police reliance on the warrant in Altman was objectively reasonable.

The test for good faith reliance on the warrant imposes upon the officer involved in obtaining and executing the search warrant a continuing duty to exercise reasonable professional judgment. Randolph, 4 P.3d at 483. The officer must read the affidavit and warrant carefully and must be objectively persuaded that the warrant is sufficient. Id. In determining whether a reasonably well trained officer would

have known that the search was illegal despite the magistrate's authorization, a reviewing court should take all the circumstances surrounding the issuance of the warrant into account. Id.

As we did in Randolph, we now address the law of probable cause and the good faith exception for police reliance on a warrant. Then, we apply that law to the warrant and the seizure of evidence in this case.

B. Probable Cause

The Fourth Amendment to the United States Constitution and article II, section 7, of the Colorado Constitution prohibit the issuance of a search warrant except upon probable cause supported by oath or affirmation particularly describing the place to be searched and the things to be seized. U.S. Const. amend. IV; Colo. Const. art. 2, § 7; see also § 16-3-303, 6 C.R.S. (2002) (specifying the requirements for a search warrant). Because there is no mechanical formula for determining probable cause, reasonable minds may differ on the question of whether a particular affidavit establishes probable cause. Altman, 960 P.2d at 1167. A reviewing court should uphold the validity of a warrant if the affidavit accompanying the warrant creates a substantial basis for the conclusion that probable cause existed. People v. Reed, 56 P.3d 96, 101 (Colo. 2002).

The warrant must establish probable cause to believe that contraband or evidence of criminal activity is located in the place to be searched at the time of the warrant application, not merely some time in the past. People v. Erthal, 194 Colo. 147, 570 P.2d 534 (1977). Probable cause exists when an affidavit for a search warrant alleges sufficient facts to warrant a person of reasonable caution to

believe that contraband or evidence of criminal activity is located at the place to be searched. Altman, 960 P.2d at 1167.

To determine whether probable cause exists, we examine the totality of the circumstances. Id. This analysis does not lend itself to mathematical certainties or bright line rules; rather, it involves a practical, common-sense determination whether a fair probability exists that a search of a particular place will reveal contraband or other evidence of criminal activity. Id.

Whether information is current or stale plays an important role in the totality of the circumstances analysis. See Randolph, 4 P.3d at 482; People v. Meraz, 961 P.2d 481, 484 (Colo. 1998); People v. Hearty, 644 P.2d 302, 311 (Colo. 1982); see also People v. Green, 70 P.3d 1213, 1215 (Colo. 2003) (warrant was obtained one day after the defendant was seen wearing the stolen item). Whether the information is stale and cannot support probable cause depends on the factual circumstances and the type of crime.3 People v. Lubben, 739 P.2d 833, 836 (Colo. 1987) ("In determining whether information is stale, the court must consider the type of crime the facts reveal.").

C. Good Faith Exception

Typically, when the police conduct a search without a valid warrant, the exclusionary rule operates to suppress the

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3 The type of evidence and activity involved is important. Some types of evidence the police seek to obtain through a search warrant may be relatively immune from becoming stale, for example, DNA evidence at the specified location.

fruits of the search, unless the search falls under an exception to the warrant requirement. People v. Winpigler, 8 P.3d 439, 443-44 (Colo. 1999). The exclusionary rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the aggrieved; whether to invoke the exclusionary rule is an issue separate from the question of whether Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct. United States v. Leon, 468 U.S. 897, 906 (1984). Application of the exclusionary rule is restricted to those areas where its remedial objectives are thought most efficaciously served. Id. at 908.

As a result, the exclusionary rule does not apply to situations where the police act in objectively reasonable, good faith reliance on a warrant, even if a court later holds that the warrant is defective. Randolph, 4 P.3d at 483. In such circumstances, excluding the fruits of the search would not have a deterrent effect on the police. Leon, 468 U.S. at 919-20.

The Colorado General Assembly has codified a version of the Leon test that permits admission of otherwise suppressible evidence if the evidence was seized "as the result of a good-faith mistake or of a technical violation." § 16-3-308(1), 6 C.R.S. (2002). The Leon "objectively reasonable" standard and the statutory "good faith" standard are substantially similar. Randolph, 4 P.3d at 483; People v. Leftwich, 869 P.2d 1260, 1272 (Colo. 1994). Colorado's statute, however, creates a presumption that an officer was acting in good faith if he or she acted pursuant to a warrant. See § 16-3-308(4)(b), 6 C.R.S. (2002); Randolph, 4 P.3d at 483. This presumption may be rebutted if the officer failed to undertake the search in an objectively good faith belief

that it was reasonable. Randolph, 4 P.3d at 483; Altman, 960 P.2d at 1169. If no reasonable officer would have relied upon the warrant, then objective good faith is absent and the good faith exception offers no shelter. Altman, 960 P.2d at 1169.

Accordingly, the police must act in objective good faith when they apply for the warrant; the fact that a magistrate ultimately approved the warrant is not controlling.

> [T]he fact that a magistrate acted favorably upon a warrant request is of no moment in the determination of whether the officer acted with objective reasonableness because the question of reasonableness is to be judged as of the time of warrant application and thus without consideration of the fact that the magistrate thereafter issued a warrant.

Leftwich, 869 P.2d at 1269 n.11 (emphasis added); accord Malley v. Briggs, 475 U.S. 335, 345 (1986) (the Leon analysis focuses on "whether a reasonably well-trained officer . . . would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.")(emphasis added); see Altman, 960 P.2d at 1169 n.3.

There are four circumstances under which an officer may not reasonably rely on a warrant: (1) where the issuing magistrate was misled by a known or recklessly made falsehood; (2) where the issuing magistrate wholly abandoned the judicial role; (3) where the warrant is so facially deficient that the officer cannot reasonably determine the particular place to be searched or things to be seized; or

(4) where the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Leon, 468 U.S. at 923; Randolph, 4 P.3d at 483-84. We have characterized warrants that fall under the fourth circumstance as "bare bones" warrants. E.g., Randolph, 4 P.3d at 482.

This case implicates the fourth circumstance, because the trial court found that the information in the affidavit was stale, and, consequently, the police could not have reasonably believed that it established probable cause for the search of Miller's house.

D. Application In This Case

1. Lack of Probable Cause

A proper search warrant affidavit must allege sufficient facts to warrant a person of reasonable caution to believe that evidence of criminal activity is located at the place to be searched. Leftwich, 869 P.2d at 1265. Although the affidavit for the warrant in this case alleged past criminal activity at Miller's residence, it did not tie any current criminal activity or the presence of contraband to Miller's residence.

The affidavit for the warrant related information that Miller was engaged in a course of manufacturing methamphetamine, but the most recent event of affidavit-alleged criminal activity occurring at Miller's residence was nearly a month old at the time the police applied for the warrant. As the trial court found, the affidavit related two stale allegations of criminal activity at Miller's home: the fact that he was arrested there in August 2002 after the police found a methamphetamine lab on the premises, and the fact

that an anonymous informant on December 9, 2002, told the police he had smoked methamphetamine at Miller's house and observed Miller in the process of manufacturing a batch of methamphetamine.

Thus, the most recent evidence of criminal activity at Miller's residence was almost a month old when the police applied for the warrant on January 6, 2003. The affidavit contains no information indicating that the police attempted to ascertain whether Miller's illegal activity at his residence continued after the informant's visit, or to corroborate the informant's statements. The affidavit relates one unsuccessful attempt to verify that Miller continued to live at the house to be searched.4

Under these circumstances, the excessive delay between the informant's December 9, 2002 observations and the police application of January 6, 2003 for the warrant renders the information stale and unreliable. See Randolph, 4 P.3d at 482 (evidence that the defendant smoked methamphetamine at his house was stale, as it occurred "only some time in the last two months."); People v. Stoppel, 637 P.2d 384, 391 (Colo. 1981) (month-old observations by

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4 The affidavit reports that a police officer went to the house and saw a vehicle registered to "James E. and Marsha L. Miller" parked at the residence. The affidavit provides no basis to believe that "James" Miller is the same person as "Wade" Miller. In addition, the affidavit does not state when the police made this observation, so the information is presumptively stale. See Randolph, 4 P.3d at 482 (affidavit's account of a witness statement is stale, because it did not include the time frames when the witness made his observations).

non-anonymous informant that the defendant had bomb making supplies in his residence were stale and insufficient to support probable cause).5

The current information contained in the affidavit about Miller's illegal drug manufacturing activity related to a different location from his home. The affidavit recites that on January 3, 2003, a few days before the police searched Miller's house, a different anonymous informant informed police that Miller was manufacturing methamphetamine at a trailer located elsewhere.6 The information from that informant related intimate and detailed knowledge of Miller's manufacturing activities and did not mention anything about Miller manufacturing the drug at his house, or storing it there. In fact, Miller was arrested and charged

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5 People v. Erthal, 194 Colo. 147, 570 P.2d 534 (1977) is instructive on this point. In that case, the defendant was accused of stealing some tools from a former employer. The police observed similar tools in the defendant's shop shortly after the theft. However, they waited two months before obtaining and executing a warrant to search the defendant's shop. We held that this two-month-old observation was stale, and did not support probable cause. Id. at 535. "Due to the lapse of nearly two months between the deputy's observation . . . and the issuance of the warrant, there was no probable cause to believe that stolen goods were in the shop at the time the warrant was executed." Id.

6 This second informant also told the police that Miller was manufacturing at several other locations; however, the informant did not tell the police when Miller was manufacturing at those locations, so these additional allegations are stale.

for manufacturing methamphetamine at the other location as a result of the search conducted there pursuant to a separate warrant issued the same day as the warrant for search of his home. However, the warrant for search of Miller's home set forth nothing but stale information regarding manufacture at his home.

In contrast to the month involved here, our course of conduct cases address a much shorter time between the occurrence of criminal activity set forth as the basis for the warrant and the police application for the warrant. People v.Schmidt, 172 Colo. 285, 473 P.2d 698 (1970), involved evidence that a defendant was continuously dealing drugs from his room, and a lapse of five days between the time that an informant saw drugs in the room and the time that the police sought the warrant. Id. at 292, 473 P.2d at 701. Likewise, People v. Hearty, 644 P.2d 302 (Colo. 1982), involved a lengthy conspiracy to extort money, corroborated by a series of transactions over several months, with the final transaction occurring eight days before the police sought a search warrant. Id. at 311.

In People v. Ball, 639 P.2d 1078 (Colo. 1982), the police observed literally hundreds of suspected drug transactions at the defendant's residence, with the last transaction seven days before the police sought a warrant. Id. at 1080, 1083. Finally, in Lubben, 739 P.2d 833 (Colo. 1987), the affidavit involved a situation in which the police found methamphetamine in the defendant's residence in April; received additional information that the defendant possessed methamphetamine or drug paraphernalia in November and December of the same year; conducted "sporadic surveillance" of the defendant in December and observed unusually heavy foot traffic to and from the defendant's residence; and received a tip from an informant

that seventy-two hours before they applied for a search warrant, the informant saw methamphetamine in the defendant's residence. Id. at 836.

Here, the affidavit mentions two instances of illegal drug manufacture at Miller's house, one four months old and one nearly a month old. The mobility of this type of drug manufacturing is evident from the facts of this case. The affidavit recites that Miller was manufacturing methamphetamine at various places in the past. As our case law demonstrates, without relatively current information of criminal activity or contraband at the location to be searched, probable cause is typically lacking for issuance of the warrant.

The warrant for search of Miller's home lacked probable cause. We now address whether the good faith exception to the exclusionary rule should apply to this case.

2. Inapplicability of Good Faith Exception

In the vast majority of cases where a substantial basis for determining probable cause does not exist, the police cannot rely on the good faith exception:

> [I]n the vast majority of cases, if a court . . . ascertains that a substantial basis for determining probable cause did not exist, the court will reach the conclusion that the officer unreasonably relied on the affidavit.

Leftwich, 869 P.2d at 1271 n.12.

Application of the good faith exception to allow evidence that would be suppressed otherwise turns on

whether it was "objectively reasonable" for the officer to rely on the warrant. Id. Thus, police officers involved in obtaining and executing a search warrant have a continuing duty to exercise reasonable professional judgment. Randolph, 4 P.3d at 483; Altman, 960 P.2d at 1170. The good-faith exception requires officers to have a reasonable knowledge of what the law prohibits. Leon, 468 U.S. at 919 n.20.

The affidavit in this case is a "bare bones" affidavit regarding the existence of the crucial link between the place to be searched and current information of criminal activity or the presence of contraband there.7 Randolph, 4 P.3d at 482.

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7 We emphasize that there is no bright line rule for counting of days in considering whether the affidavit is based on stale information. When the information in the affidavit focuses on one location, demonstrates ongoing activity over several months at that place, and the search warrant is for that place, courts have held that observations dating back more than one month were not stale. For example, the court in United States v. Iiland, 254 F.3d 1264, 1268-69 (10th Cir. 2001)(activity ongoing over a considerable period of time) pointed out that the "affidavit tended to show that Mr. Iiland kept the drugs he sold in the storage unit, and that he was still renting and visiting the unit a few days before the warrant was issued." Another court pointed out that "[n]othing suggested either that the conspirators would not continue in their operation or that the laboratory would be moved." United States v. Ruff, 984 F.2d 635, 638 (5th Cir. 1993). In United States v. Le, 173 F.3d 1258, 1266 (10th Cir. 1999), the reports of two informants were consistent in stating ongoing activity at the place to be searched. In contrast, the affidavit in the case before us placed the

As the trial court observed, the affidavit is bereft of current information about illegal activity at Miller's house:

> The "good faith" exception does not cure this deficiency. The affidavit is devoid of any information indicating current illegal activity at [Miller's house]. Official belief in the existence of information showing current illegal activity at [Miller's house] would be objectively unreasonable based on the information in the affidavit.

A reasonably well-trained police officer is held to know that an affidavit without any relatively current information of illegal activity or the presence of contraband at a residence does not create probable cause to search the residence. Consequently, we agree with the trial court that the police did not reasonably rely on the warrant.

The prosecution urges us to consider information outside the affidavit to establish that the police met the objective good faith standard for admission of the seized evidence.8 This information was included in the affidavit to

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ongoing drug manufacturing at a different location from the place to be searched.

8 The prosecution's brief to us argues that the officer who sought and executed the warrant acted in objective good faith, in part because "he possessed more knowledge of criminal activity at [Miller's house] than he stated in his warrant; to wit: that he personally spoke with another informant on December 20, 2002, who told him that Miller continues to manufacture methamphetamine in his home."

search the house of Miller's friend, or was discovered as a result of that search, and was "overlooked" in the affidavit for this warrant.9 However, like the trial court, we are restricted to the information contained within the four corners of the affidavit. See Reed, 56 P.3d at 101 (courts must consider whether reliance on the warrant was objectively reasonable, based on the contents of the warrant, and cannot inquire into the police's subjective good faith). Thus, we decline to bolster the insufficient affidavit in this case with additional information not conveyed to the magistrate in the application for this warrant.

(emphasis in original). People's Opening Brief at 8, People v. Miller, No. 03SA107.

9 For example, the warrant for the friend's house recites that an informant told the police on December 20 that Miller had continued to manufacture methamphetamine since his August arrest, and Miller primarily manufactures at his home and at his friend's residence. The People urge us to consider this information, arguing:

> A comparison of Officer Lopez's probable cause affidavit for the search of [Miller's residence] and Deputy Jolliffe's probable cause affidavit for the search of [Miller's friend's residence] clearly demonstrate that the two officers shared information
>
> and worked together in composing their affidavits. It is also clear that Officer Lopez simply overlooked stating an important detail when composing his affidavit. (emphasis added). People's Opening Brief at 6.

Given the facts of this case, applying the exclusionary rule to suppress the evidence seized has the salutary effect of requiring the police to use in the affidavit for the search warrant current information they have available, or may obtain, to establish the link between the place to be searched and the existence of criminal activity or contraband there. Establishing this link is at the heart of Fourth Amendment protections.

III. Conclusion

Accordingly, we affirm the trial court's suppression order and remand this case for further proceedings consistent with this opinion.

JUSTICE COATS dissents, and JUSTICE KOURLIS and JUSTICE RICE join in the dissent.

JUSTICE COATS, dissenting:

Today the court declares inadmissible, as the product of an illegal search, the physical evidence of the defendant's manufacture of methamphetamine in his home. The majority does so despite discovery of the evidence during the execution of a warrant to search the defendant's home, issued by a neutral magistrate, in reliance upon a three and one-half page, single-spaced, typewritten affidavit, and despite acknowledging a finding of sufficient reliable information in the affidavit to implicate the defendant in the manufacture of methamphetamine. Although the affidavit undeniably alleges observations of the defendant's continuous, and very recent, production of methamphetamine at a number of locations, the majority finds fatal to the search of his home the failure of the affidavit to document observations at that specific location for almost a month.

Because I believe the majority opinion betrays a fundamental misunderstanding of the purpose and scope of the staleness inquiry; amounts to a substantial departure from the precedent of not only this court but federal and state courts across the country; and evinces a general hostility toward the good faith exception to the exclusionary rule, I respectfully dissent.

Ordinarily, it would be enough for reversal of a suppression order that the search fell within the good faith exception to the exclusionary rule. People v. Altman, 960 P.2d 1164 (Colo. 1998). Because of the majority's staleness analysis, however, I feel obliged to explain why there was actually a substantial basis for the magistrate's finding of probable cause and issuance of the warrant. Although I do not consider the existence of probable cause to search the defendant's home a close question in this appeal, I do consider it important to emphasize that a warrant is not erroneously issued at all as long as there is at least a "substantial basis" to support it. People v. Gall, 30 P.3d 145, 150 (Colo. 2001).

While specific statutes or rules may impose formal time limitations on the execution of a search warrant, see, e.g., § 16-3-305(6), 6 C.R.S. (2002) (ten days from date of issuance); Crim. P. 41(d)(V)(VI) (same), the Fourth Amendment has never been construed to assign a life-span to information disclosing the commission of a crime. "Staleness" is simply a concept that expresses the reality that information making it likely that items connected to a crime will be found at a particular time and place may lose its force with the passage of time. Information amounting to probable cause to search for evidence of a crime at a particular point in time may therefore no longer amount to probable cause to search at a later point in time. Probable cause, however, "is

not determined by merely counting the number of days between the time of the facts relied upon and the warrant's issuance." United States v. Rahn, 511 F.2d 290 (10th Cir. 1975). Rather, the likelihood that evidence of a crime will still be found in the same place is a function of a host of variables that are unrelated to the calendar. See Andresen v. State, 24 Md. App. 128, 331 A.2d 78 (Md. Ct. Spec. App. 1975). Chief among them is the nature of the criminal activity at issue.

Along with virtually every other jurisdiction considering the question, we have often acknowledged that the passage of time becomes less significant where information indicates criminal activity of a protracted or continuous nature. See, e.g., People v. Erthal, 194 Colo. 147, 570 P.2d 534 (Colo. 1977) ("There was no information that the suspect continuously engaged in criminal activity or continued to use feloniously obtained tools, factors which might have justified the belief that the stolen items would still be in the location searched."); United States v. Johnson, 461 F.2d 285 (10th Cir. 1972) (time has no meaning in determining probable cause apart from the nature and length of criminal activity and the nature of property to be seized). Time lapses running weeks, or even months, have been upheld where affidavits for search warrants indicated probable cause of ongoing criminal enterprises, of a wide variety. See generally 2 Wayne R. LaFave, Search & Seizure § 3.7(a), 344-46 nn. 17-26 (3d ed. 1996) (illegal paramilitary operations, gambling operations, ongoing fraud or loansharking operations, ongoing processing or repeated sales of drugs, liquor, or guns, repeated thefts or receipt of stolen property).

Especially with regard to illegal drugs, probable cause of ongoing sales and production has been expressly

distinguished from probable cause of mere use. Compare Andresen, ("The observation of half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in . . . .") with United State v. Hyde, 574 F.2d 856 (5th Cir. 1978) (holding in context of widespread and continuing conspiracy to smuggle drugs, "The upshot of this rule to practical application has been to allow fairly long periods of time to elapse between information and search warrant of criminal activity.") In light of the nature of the manufacturing or growing process and the nature of a conspiracy or enterprise to produce and/or sell drugs, information that is months old has regularly been held sufficient to establish probable cause to support a search. See, e.g., United States v. Iiland, 254 F.3d 1264 (10th Cir. 2001) (three months since cocaine sale); United States v. Smith, 266 F.3d 902 (8th Cir. 2001) (three months since cocaine sale); United States v. Ruff, 984 F.2d 635 (5th Cir. 1993) (two months since observation of meth lab); United States v. Dixon, 247 F. Supp. 2d 926 (S.D. Ohio 2002) (two months since cocaine sale); United States v. Seibert, 779 F. Supp. 366 (E.D. Pa. 1991) (three months since meth sale at defendant's trailer); Lovett v. Commonwealth, 103 S.W.3d 72 (Ky. 2003) (two months since observation of meth lab); State v. Hage, 568 N.W.2d 741 (N.D. 1997) (four months since supplier of meth lab ingredients named); State v. Wilson, 852 P.2d 910 (Ore. 1993) (six weeks since observation of meth lab); People v. Wilson, 227 Cal. Rptr. 528 (Cal. App. 6 Dist. 1986) (six weeks since observation of strong odor of meth).

The affidavit in this case indicated ongoing operations. It made clear that the affiant officer had already seized a meth lab from the defendant's home in August, as a result of which the defendant was charged with manufacturing and distributing and was released on bond. It

also contained detailed information from an informant who had been in the defendant's home in December, four months later, that the defendant was still regularly manufacturing methamphetamine at both his home and the Orchard location. The affidavit further contained detailed information from another informant from early January, just days before the issuance and execution of the warrant, that the defendant and another man were continuing to manufacture methamphetamine at the Orchard address, as well as several other locations. Unlike the majority, I consider it permissible to infer from this information that the defendant had not, in the last month, mysteriously stopped manufacturing methamphetamine at his home and removed all evidence of his operations there, while continuing to maintain all of his other operations.

Where the location to be searched is a suspected drug dealer's home, often no greater nexus to that specific location is required because experience dictates that drug dealers ordinarily keep their supply, records, and monetary profits at home. See generally 2 LaFave, at 379. It literally defies commonsense, where there is good reason to believe that the defendant (while out of jail on bond for doing the same thing) continues to use methamphetamine, to acquire a supply of the materials required for its manufacture, and in fact to manufacture the drug at a number of locations simultaneously; and where he clearly manufactured the drug in his home before being arrested and was observed still doing so at least four months afterward; to hold that there is not even a reasonable probability that his home has continued to be one of his manufacturing sites, or at least still contains evidence of his ongoing manufacturing operations. The majority's decision to limit the life-span of probable cause to a set number of days following the last information of drug manufacturing at a particular location is not only

contrary to our prior holdings but fails to appreciate the significance of being a continuing and ongoing operation.

While I am concerned about the majority's attempt to distinguish this case from our prior "course of conduct" cases on the grounds that we have not previously decided a case involving the same number of days between observation and issuance, see maj. op. at 14, I am much more concerned by its holding that no well-trained police officer could reasonably believe the information to still establish probable cause. The majority not only reduces the probable cause determination to a mechanical (if not arbitrary) counting process; it forces police officers to predict precisely where the court will draw the cutoff line. Even if it did not fly in the face of an abundance of counter-examples from courts across the country, this holding can only serve to encourage officers to rely on their own counting rather than the appropriate assessment of the nature and circumstances of the criminal activity by a neutral magistrate. Having a good faith exception serves little purpose if acting in good faith means nothing more than accurately predicting the ultimate conclusion of the courts.

The exception to the exclusionary sanction does not apply, nor should it, if the magistrate misbehaves or is misled by police misbehavior, or if the affidavit is so lacking in indicia of probable cause – is so "bare bones" – as to render official belief in its existence entirely unreasonable. In this case, the trial court did not apply the good faith exception because it believed that the month-long interval between observations of manufacturing in the defendant's home and issuance of the warrant not only rendered that information stale but made unreasonable any belief by trained officers that the affidavit contained probable cause for the search. In upholding that ruling, the majority in effect finds it

unreasonable for well-trained officers to rely on a probable cause determination by a neutral magistrate that would be upheld as fully justified by other justices of the jurisdiction's highest court.

The good faith exception to the exclusionary rule springs from the realization that the suppression of evidence as a sanction is unlikely to significantly modify executive branch behavior undertaken in objectively reasonable good faith. United States v. Leon, 468 U.S. 897 (1984). In addition to avoiding an extremely high cost to society, with little corresponding benefit, the exception has an additional salutary effect of promoting a judicial preference for warrants, by largely insulating executive branch officers from the mistakes of judicial magistrates. Not only does the majority's narrow interpretation nullify virtually any beneficial effect of the good faith exception; its unrealistic time and place restrictions on the probable cause determination severely undercut incentives to seek warrants in cases of ongoing methamphetamine operations. If delay by the police, in order to accumulate more and better information, is rewarded by disallowing information as stale, police will be faced with the dilemma whether to act on less information while it is more fresh, relying on the exigencies of the situation to excuse judicial approval in advance. Because I consider the majority holding to be wrong, both as a matter of law and as a matter of policy, and because I believe it will have a substantial negative impact on combating a serious social problem in this jurisdiction, I respectfully dissent.

I am authorized to say that JUSTICE KOURLIS and JUSTICE RICE join in this dissent.

Appendix A-1

STATE OF COLORADO)
) ss. AFFIDAVIT
COUNTY OF FREMONT)

In support of a request for the issuance of a SEARCH WARRANT FOR: 406 Riverside Drive, a yellow house with blue trim, located in the City of Canon City, County of Fremont, State of Colorado to search for Methamphetamine, ephedrine based pills, psudoephedrine based pills, drug paraphernalia, Methamphetamine lab equipment, precursor chemicals, money, records, weapons, receipts, and any other items that would relate to the use, possession, manufacturing, or trafficking of drugs.

THE UNDERSIGNED AFFIANT, BEING FIRST DULY SWORN UPON OATH, DEPOSES AND SAYS:

Your Affiant is Andrew J. Lopez, a Police Officer with the Canon City Police Department. I have been employed as a police officer for approximately seven years and am currently assigned to the narcotics investigations division of the Canon City Police Department. I have attended at least 192 hours of narcotics training involving the searches of vehicles and homes containing Methamphetamine labs, money, precursor chemicals, lab equipment, multiple grams of illegal drugs, and large amounts of money. I have also experienced first hand searches of vehicles and homes containing Methamphetamine labs, money, precursor chemicals, lab equipment, multiple grams of illegal drugs, and large amounts of money.

On December 12th, 2002 I received a phone call from South Metro Drug Task Force Agent Angela Fritz, who advised she had information regarding the manufacture of methamphetamine in Canon City. Agent Fritz advised the following:

- She had two persons in custody after they were reported to have been purchasing large quantities of ephedrine and pseudoephedrine based pills at a store in her area
- They stopped the two persons at a traffic stop and saw in plain view numerous boxes of pills and a glass methamphetamine pipe
- One of the two persons, wishing to remain anonymous, told her the following:

  - On Monday, December 9th, 2002, they were in Wade Miller's house, 406 Riverside Drive, Canon City, Fremont County, Colorado, and Wade was actively manufacturing methamphetamine in the house
  - They smoked some methamphetamine with Wade, which he had just manufactured
  - Wade had Toluene, Coffee Pots, Muriatic Acid, Anhydrous Ammonia and Salt
  - Wade's batch of methamphetamine was "salting out"
  - Wade drive's [sic] a Blue Ford Bronco
  - Wade is keeping methamphetamine manufacturing supplies under the kitchen cabinets in his house
  - They are a methamphetamine user and manufacturer and were collecting pills to manufacture methamphetamine
  - Wade Miller has also been cooking at an address on Orchard, at the entrance to Mountain View Park, in the last trailer to the East
  - The trailer belongs to Valerie Shetrone and a man named Nick (last name unknown)

- Valerie and Nick allow Wade and Jacob Lopez to manufacture methamphetamine in the trailer
- The trailer has an addition to the rear with some sort of aluminum cover over it
- Jacob Lopez has been recently arrested, but Wade continues to manufacture in the trailer
- Approximately 2 weeks ago they personally observed Sudafed pills, Xylol, a "bubbler," Red Devil Lye, Tubing, and Glassware in this trailer home
- Wade has been regularly manufacturing methamphetamine at either the Riverside or the Orchard address

Agent Fritz went on to say the second person arrested, wishing to remain anonymous, offered Jim Sampson's current location, stating that Jim was at the Econo Lodge on the North end of Pueblo, and had a warrant for his arrest.

I advised Canon City Police Department Detective Jeff Worley of the information I received. Detective Worley identified the Orchard address as 926 Orchard, with a trailer number believed to be #C, and described it as two White trailer houses with Brown trim, connected by some kind of walkway between the two, with a round metal building attached on the North side. Detective Worley found one car parked at the trailer, bearing Colorado license plate number 629CRH, which came back to a Claudia J. Shetrone and a Valeria R. Holtz of 926 Orchard Avenue. Detective Worley also went to 406 Riverside where he found an 85 Ford 2 door, bearing Colorado license plate number NOVLU, which came back to James E. and Marsha L. Miller. Detective Worley indicated that there were several people around the property at the time he went by.

I recognized all the chemicals and terms referred to by the first anonymous party as being integral parts of the methamphetamine manufacturing process. I know Jacob Lopez was just recently arrested and Wade Miller is currently out on bond on charges of manufacturing and distributing methamphetamine, after I found a meth lab in his home on August 14th, 2002. I also know Jacob Lopez was arrested following the seizure of this meth lab, when he approached 406 Riverside and was found to have methamphetamine and paraphernalia with him. I also know Jim Sampson was wanted on a warrant for manufacturing meth at his shop at 2027 South Street, located [sic] on November 22nd, 2002. I recalled Wade Miller's Criminal History and knew he was arrested in Canon City 1992 [sic] for 2 counts of Distributing Marijuana, and Distribution of Dangerous Drugs (Methamphetamine).

On January 3rd, 2002 [sic] Fremont County Sheriff's Deputy Mike Joliffe spoke to a person, wishing to remain anonymous, who advised the following:

- Wade Miller 05/25/64 is driving a navy blue, Ford, Bronco
- Wade Miller and Jacob Lopez manufacture methamphetamine together
- Jeff West owns a fake penis that has a fake bladder, that West, Jacob Lopez and Wade Miller use to pass urinalysis test [sic] as part of the M.A.P.P. program
- Wade Miller uses his boss's credit card to purchase urine from an online business through the internet
- Wade Miller and Jacob Lopez use a trailer located on Orchard Avenue in Canon City. This trailer is next to Mountain View Park. The trailer has a metal rounded building located at the back of the trailer
- The trailer they use to manufacture methamphetamine

belongs to Nick Bufmack

- Bufmack stated to Miller, that it is ok to make meth in the trailer, but he wants to know when they are doing it
- Bufmack has a girlfriend named Val (the only name this person has ever heard her called)
- Val has a mother that lives in the area of the trailer and has in the past reported smelling strange smells coming from the area
- Recently the police responded to one complaint of the smell and Jacob Lopez was hiding in the trailer until they left
- A person by the name of Jim Woldridge purchases the chemicals and ephedrine based pills for Wade Miller
- Wade Miller manufactures methamphetamine on Friday nights, but only if he has at least 1000 ephedrine based pills to cook with
- Wade Miller in the past has gone to a home in Florence that belongs to Cindy and Rod Steele
- Miller and Rod would manufacture methamphetamine in the shed on the property
- Rod has anhydrous ammonia tanks buried in the back yard
- Wade Miller's brother Chuck Miller and his girlfriend/wife with a last name of Washburn, will go to Salida and Denver to purchase Ephedrine based pills for Wade
- Chuck and Washburn live on some property up in Tallahassee
- Wade will go up on the property on occasion to manufacture methamphetamine
- Wade has anhydrous ammonia tanks buried on the property
- Wade is sharing anhydrous ammonia tanks with John

Messer

- Messer lives in Williamsburg.

On this same date Fremont County Sheriff's Deputy Jay Dexter arrested Wade Miller for driving under revocation. Miller was arrested driving a blue, Ford, Bronco that registered to Harmony Britton. I arrested Harmony Britton for possession of Methamphetamine after she approached 406 Riverside following the seizure of the meth lab at the residence on August 14th, 2002.

I recognized all the chemicals and terms referred to by the first anonymous party as being integral parts of the methamphetamine manufacturing process. I know Jacob Lopez was just recently arrested and Wade Miller is currently out on bond on charges of manufacturing and distributing methamphetamine, after I found a meth lab in his home on August 14th, 2002. I have received several anonymous tips since Wade Miller bonded out that he has continued to manufacture and sell methamphetamine. I also arrested Jacob Lopez following the seizure of this meth lab, when Jacob approached 406 Riverside there was methamphetamine and paraphernalia on his person.

Wade Miller's Criminal History shows the following:

1992 arrested for marijuana distribution and distribution of dangerous drugs.
1994 arrested for DUI.
2002 arrested for distribution and manufacturing of schedule II, possession of schedule II, possession of narcotic equipment, driving under the influence of drugs, marijuana and unlawful manufacturing of schedule II.

I know the anonymous person that spoke to Deputy Jolliffe is not the same as the anonymous person I spoke to, because they are of different genders.

Subscribed and sworn before me this 6th Day of January, 2003.

APPENDIX B

COMBINED COURTS CASE NO.SEARCH WARRANT
COUNTY OF FREMONT
STATE OF COLORADO
AGENCY CASE NUMBER: 2024175

THE PEOPLE OF THE STATE OF COLORADO

TO: THE SHERIFF, UNDERSHERIFF, DEPUTY SHERIFF, AND ALL LAW ENFORCEMENT OFFICERS OF FREMONT COUNTY, COLORADO, GREETINGS:

WHEREAS, Officer Andrew J. Lopez of the Canon City Police Department, has made an Affidavit and Complaint for the issuance of a Search Warrant.

AND WHEREAS, the Affidavit of the applicant seems proper and it appears that probable cause exists for the issuance of a Search Warrant for the reason or reasons marked with a "X" below:

The property to be searched for, and seized if found is:

( ) Stolen or embezzled OR
(XX) Designed or intended for use or which is or had been used as a means of committing a criminal offense or the possession of which is illegal, OR
(XX) Would be material evidence in a subsequent criminal prosecution.

WE THEREFORE COMMAND YOU, with the necessary and proper assistance, to enter and search 406

(b2)

Riverside Drive, its outbuildings, its property, and vehicles present, located in Canon City, Fremont County, Colorado, to search for Methamphetamine, ephedrine based pills, pseudoephedrine based pills, drug paraphernalia, Methamphetamine lab equipment, precursor chemicals, money, records, weapons, receipts, any other items that would relate to the use, possession, manufacturing, or trafficking of drugs, and if the same or any part thereof is found. that you seize the goods and things found and safely keep them until further order of this court or until they are admitted into any criminal proceedings conducted by a Court of this State; and that you further file a report with this Court inventorying the goods and things which were found and seized or reporting nothing was so found and seized. 406 Riverside Drive is a yellow house with blue trim.

DONE this 6th day of January, 2003.

(b3)

STATE OF COLORADO)
)ss. AFFIDAVIT
COUNTY OF FREMONT)

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On December 12th, 2002, I received a phone call from South Metro Drug Task Force Agent Angela Fritz, who advised she had information regarding the manufacture of methamphetamine in Canon City. Agent Fritz advised the

following:

- She had two persons in custody after they were reported to have been purchasing large quantities of ephedrine and pseudoephedrine based pills at a store in her area
- They stopped the two persons on a traffic stop and saw in plain view numerous boxes of pills and a glass methamphetamine pipe
- One of the two persons, wishing to remain anonymous, told her the following:

- On Monday, December 9th, 2002, they were in Wade Miller's house, 406 Rive~side Drive, Canon City, Fremont County, Colorado, and Wade was actively manufacturing methamphetamine at the house
- They smoked some methamphetamine with Wade, which he had just manufactured D Wade had Toluene, Coffee Pots, Muriatic Acid, Anhydrous Ammonia and Salt Wade's batch of methamphetamine was "salting out"
- Wade drives a Blue Ford Bronco
- Wade is keeping methamphetamine manufacturing supplies under the kitchen cabinets in his house
- They are a methamphetamine user and manufacturer and were collecting pills to manufacture methamphetamine
- Wade Miller has also been cooking at an address on Orchard, at the entrance to Mountain View Park, in the last trailer to the East
- The trailer belongs to Valerie Shetrone and a man named Nick (last name unknown)
- Valerie and Nick allow Wade and Jacob Lopez to manufacture methamphetamine in the trailer
- The trailer has an addition to the rear with some sort of aluminum cover over it
- Jacob Lopez has been recently arrested, but Wade continues to manufacture in the trailer

- Approximately 2 weeks ago they personally observed Sudafed pills, Xylol, a "bubbler", Red Devil Lye, Tubing, and Glassware in this trailer home
- Wade has been regularly manufacturing methamphetamine at either the Riversic or the Orchard address

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his home on August 14th , 2002. I also know Jacob Lopez was arrested following the seizure of this meth lab, when he approached 406 Riverside and was found to have methamphetamine and paraphernalia with him I also know Ji; Sampson was wanted on a warrant for manufacturing meth at his shop at 2027 South Street, located on November 22nd, 2002. I recalled Wade Miller's Criminal History and knew he was arrested in Canon City 1992 for 2 counts of Distributing Marijuana, and Distribution of Dangerous Drugs (Methamphetamine).

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- Wade Miller and Jacob Lopez manufacture methamphetamine together
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- Wade Miller uses his boss's credit card to purchase urine from an online business through the internet
- Wade Miller and Jacob Lopez use a trailer located on Orchard Avenue in Canon City. This trailer is next to the Mountain View Park. The trailer has a metal rounded building located at the back of the trailer
- The trailer they use to manufacturer the methamphetamine belongs to Nick Bufmack
- Bufmack stated to Miller, that it is ok to make meth in the trailer, but he wants to know when they are doing it

(b7)

- Bufmack has a girlfriend named Val (the only name this person has ever heard her called)
- Val has a mother that lives in the are of the trailer and has in the past reported smelling strange smells coming from the area
- Recently the police responded to one complaint of the smell and Jacob Lopez was hiding in the trailer until they left
- A person by the name of Jim Woldrige purchases the chemicals and ephedrine based pills for Wade Miller
- Wade Miller manufactures methamphetamine on Friday nights, but only if he had a least 1000 ephedrine based pills to cook with
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- Rod has anhydrous ammonia tanks buried in the back yard
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- Wade will go up on the property on occasion to manufacture methamphetamine
- Wade has anhydrous ammonia tanks buried on the property

- Wade Miller is sharing anhydrous ammonia tanks with John Messer
- Messer lives in Williamsburg

On this same date Fremont County Sheriff's Deputy Jay Dexter arrested Wade Miller for driving under revocation. Miller was arrested driving a blue, Ford, Bronco that registered to Harmony Britton. I arrested Harmony Britton for possession of Methamphetamine after she approached 406 Riverside following the seizure of the meth lab at the residence on August 14, 2002.

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Wade Miller's Criminal History shows the following:

- 1992 arrested for marijuana distribution and distribution of dangerous drugs.
- 1994 arrested for DUI.
- 2002 arrested for distribution and manufacturing of schedule II, possession of schedule II, possession of narcotic equipment, driving under the influence of drugs, marijuana and unlawful manufacturing of schedule H.

(b9)

I know the anonymous person that spoke to Deputy Jolliffe is not the same as the anonymous person I spoke to, because they are of different genders.

Further your Affiant sayeth naught

_____

Affiant

Subscribed and sworn before me this 6th day of January, 2003.

APPENDIX C

DISTRICT COURT, FREMONT COUNTY COMBINED COURTS 136 JUSTICE CENTER ROAD, ROOM 103 CANON CITY, COLORADO 80212	
THE PEOPLE OF THE STATE OF COLORADO, v. WADE MILLER, DEFENDANT.	▲ **COURT USE ONLY** ▲
Prepared by the Court: Fremont County, State of Colorado 136 Justice Center Road, Room 103 Canon City, CO 81212	Case No.: 03CR11 Division 2 Courtroom 301
ORDER	

This matter comes before the Court upon a Motion to Suppress the evidence obtained from 406 Riverside Drive, Canon City, Colorado. The Court has considered the arguments and authorities cited. The Motion is granted.

The Affidavit dated January 2, 2002 clearly establishes probable cause to believe Wade Miller was manufacturing methamphetamines. However, it fails to establish probable cause that it was occurring at 406 Riverside. The only information in the affidavit related to 406 Riverside is:

"On December 12, 2002, I received a phone call from South Metro Drug Task Force Agent Angela Fritz, who advised she

had information regarding the following:

> She had two persons in custody after they were reported to have been purchasing large quantities of ephedrine and pseudoephedrine based pills at a store in her area

They stopped the two persons on a traffic stop and saw in plain view numerous boxes of pills and a glass methamphetamine pipe

One of the two persons, wishing to remain anonymous, told her the following:

- On Monday, December 9, 2002, they were in Wade Miller's house, 406 Riverside Drive, Canon City, Fremont County, Colorado, and Wade was actively manufacturing methamphetamine at the house
- They smoked some methamphetamine with Wade, which he had just manufactured Wade had Toluene, Coffee Pots, Muriatic Acid, Anhydrous Ammonia and Salt

Wade's batch of methamphetamine was "salting out"

- Wade drives a Blue Ford Bronco
- Wade is keeping methamphetamine manufacturing supplies under the kitchen cabinets in his house
- They are a methamphetamine user and manufacturer and were collecting pills to manufacture methamphetamine"

Also, the affidavit mentions several times that a search warrant was executed at 406 Riverside on August 14,

2002 and numerous people were arrested at that home when a methamphetamine lab was located there. The District Attorney argues that the information in the affidavit is not stale because it shows a continuing course of conduct or, alternatively that even if the information is insufficient, the good faith exception applies. (§ 16-3-308, 6 C.R.S. (2002)).

In support of her argument that the information was not stale, the District Attorney cites People v. Reed, 56 P.3d 96 (Colo. 2002), People v. Lubben, 739 2 P.2d 833 (Colo. 1987), and United States v. Mascarenas, 30 Fed. Appx. 784, 2002 WL172685 (l0th Cir. Colo.). Each of these cases has more compelling facts than are contained in this case. In Reed, in support of the search warrant for Room 12 requested on November 6, 2001 the Court notes the affidavit stated the Defendant moved from one motel room (Room 3) where remnants of a methamphetamine lab had been found to room 12 of the same motel on November 4, 2001, that the Defendant was seen smoking outside Room 12 two days prior to the search, which is a common practice for methamphetamine manufacturers to avoid igniting vapors and that a few days prior to the search request an empty acetone container and ephedrine was found in Reed's vehicle. In Lubben, which does discuss a continuing series of illegal activities, the court notes the affidavit should be read as indicating that during the month preceding the application for the warrant, officers conducted "sporadic surveillance" and observed heavy foot traffic consistent with drug trafficking, between the two residences, and within 72 hours of the search the Confidential informant observed methamphetamine at one of the addresses. In Mascarenas, in addition to reflecting ongoing and continuous drug activity the affidavit also showed recent drug activity at

the places to be searched. These cases do not support the issuance of a warrant in this case where the only information tying the methamphetamine lab to the Riverside address is approximately one month prior to the application for the warrant with subsequent investigation yielding no additional information as to that residence but rather information as to a different address. People v. Randolph, 4 P.3d 477 (Colo. 2000)

The "good faith" exception does not cure this deficiency. The affidavit is devoid of any information indicating current illegal activity at the Riverside address. Official belief in the existence of information showing current illegal activity at the Riverside address would be objectively unreasonable based on the information in the affidavit. (People v. Altman, 960 P.2d, 1164 (Colo. 1998.) Therefore the Motion to Suppress is granted. The evidence seized pursuant to this affidavit may not be used by the prosecution in support of criminal charges.

BY THE COURT:

_____

Julie G. Marshall, Judge

Supreme Court, U.S.
FILED
APR 2 6 2004
OFFICE OF THE CLERK

No. 03-836

IN THE SUPREME COURT OF THE UNITED STATES

The People of the State of Colorado, Petitioner

v.

Wade Paul Miller, Respondent

On Petition for a Writ of Certiorari to the
Colorado Supreme Court

MOTION OF RESPONDENT WADE PAUL MILLER TO PROCEED *IN FORMA PAUPERIS*

Dean Neuwirth*
Burke & Neuwirth P.C.
1660 Wynkoop St., #810
Denver, CO 80202
(303) 825-3050
*Counsel of Record

Josh T. Liles
The Law Office of Ernest Marquez, P.C.
P.O. Box 1203
Salida, CO 81201
(719) 539-7663

Respondent Wade Paul Miller ("Miller") moves to proceed *in forma pauperis* under Rule 39 of the Rules of the Supreme Court of the United States, and as grounds states:

1. The Colorado Attorney General has filed a petition for a writ of certiorari to the Colorado supreme court, challenging the Colorado supreme court's ruling in People v. Miller, 75 P.3d 1108 (Colo. 2003). This court has ordered that Miller respond to the petition. Miller needs to proceed *in forma pauperis* in order to respond.

2. Miller is an impoverished inmate in the custody of the Colorado Department of Corrections. He has been continuously incarcerated since January 6, 2003. He has not yet been tried, because Miller affirmed the Colorado state district court's pretrial suppression of evidence. The Colorado supreme court decided Miller through a Colorado mechanism for interlocutory review of pretrial suppression orders. Miller's case has been stayed pending resolution of proceedings in this court. Accordingly, Miller will remain incarcerated through the end of proceedings in this court and through the resumption of proceedings in the case in the state district court.

3. In state district court, and also in state supreme court on the interlocutory appeal, Miller was determined to be an indigent person and was represented by Josh Liles, a lawyer appointed under the Sixth Amendment right to counsel and under Colorado's alternate defense counsel law, Colo.Rev.Stat. §21-2-101 *et seq.* which implements the constitutional right to counsel. The alternate defense counsel law applies when the state public defender is unable to

represent an indigent defendant. Miller continues to be represented by Liles before this court, but because Liles does not yet qualify for admission to the bar of this court, Dean Neuwirth has been appointed as co-counsel under Colo.Rev.Stat. §21-2-101 *et seq.*

5. Attached to this motion is Miller's signed declaration in support of his motion for leave to proceed *in forma pauperis*. Miller requests leave to proceed *in forma pauperis*.

6. Also attached to this motion is Miller's opposition to the prosecution's petition for a writ of certiorari. Miller asks leave to file the opposition without payment of costs.

Dated: April 26, 2004

Dean Neuwirth*
Burke & Neuwirth P.C.
1660 Wynkoop St., #810
Denver, CO 80202
(303) 825-3050
*Counsel of Record

Josh T. Liles
Law Office of Ernest Marquez, P.C.
P.O. Box 1203
Salida, CO 81201
(719) 539-7663

Appointed lawyers for Wade Paul Miller

FINANCIAL DECLARATION

Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis

I swear or affirm under penalty of perjury that, because of my poverty, I cannot pre-pay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)

My issues on appeal are: My court-appointed lawyer is opposing the state attorney general's effort to have this court review my case.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months.		Amount expected next month.	
	You	Spouse	You	Spouse
Employment	Y/N $ 0	$	$ 0	$
Self-employment	Y/N $ 0	$	$ 0	$
Income from real property (such as rental income)	Y/N $ 0	$	$ 0	$
Interest and dividends	Y/N $ 0	$	$ 0	$
Gifts	Y/N $ 0	$	$ 0	$
Alimony	Y/N $ 0	$	$ 0	$
Child Support	Y/N $ 0	$	$ 0	$
Retirement (such as social security, pensions, annuities, insurance)	Y/N $ 0	$	$ 0	$
Disability (such as social security, insurance payments)	Y/N $ 0	$	$ 0	$
Unemployment payments	Y/N $ 0	$	$ 0	$
Public-assistance (such as welfare)	Y/N $ 0	$	$ 0	$
Other (specify:_____)	Y/N $ 0	$	$ 0	$

Total Monthly Income: $0 $6 $6 $0

2. List you and your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Yourself:	Your Spouse:
Name and Address of Employer	Name and Address of Employer
D.S.	~
Length of Employment: 0 Years 0 Months	Length of Employment: ____ Years ____ Months
Monthly Gross Pay $0	Monthly Gross Pay $____

3. How much cash do you and your spouse have: $ 50

Below state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution:	Type of Account:	Amount you have:	Amount your spouse has:
Power Credit Union	Saving	$ 50.00	$
		$	$
		$	$

4. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home	Address:	Value: $ 0 Amount owed on mortgages and liens: $ 6
Other real estate	Address:	Value: $ 0 Amount owed on mortgages and liens: $ 0

Motor vehicle	Model/Make/Year/Registration: 79 Ford Bronco	Value: $ 8000 ? Amount owed: $ -0-
Motor vehicle	Model/Make/Year/Registration: _____	Value: $ _____ Amount owed: $ _____
Other	Description: _____ _____	Value: $ _____ Amount owed: $ _____

5. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you:	Amount owed to your spouse:
_____	$ 0	$ _____
_____	$ 0	$ _____

6. State the persons who rely on you or your spouse for support. Indicate their relationship to you, their age, and whether they live with you.

Name	Relationship	Age	Does this person live with you?	
_____	_____	_____	Yes ____	No ____
_____	_____	_____	Yes ____	No ____
_____	_____	_____	Yes ____	No ____
_____	_____	_____	Yes ____	No ____

7. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semi-annually, or annually to show the monthly rate.

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ 0	$ _____
Are real estate taxes included? Yes ____ No ____ Is property insurance included? Yes ____ No ____ Utilities: Electricity and heating fuel	$ 0	$ _____
Water and sewer	$ 0	$ _____
Telephone	$ 0	$ _____

Other _____	$ 0	$ _____
Home maintenance (Repairs and upkeep)	$ 0	$ _____
Food	$ 0	$ _____
Clothing	$ 0	$ _____
Laundry and dry cleaning	$ 0	$ _____
Medical and dental expenses	$ 0	$ _____
Transportation (not including motor vehicle payments)	$ 0	$ _____
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ _____
Charitable contributions	$ 0	$ _____
Insurance (not deducted from wages or included in Mortgage payments)		
Homeowner's or renter's	$ 0	$ _____
Life	$ 0	$ _____
Health	$ 0	$ _____
Motor Vehicle	$ 0	$ _____
Other _____	$ 0	$ _____
Taxes (not deducted from wages or included in Mortgage payments) (specify):_____	$ 0	$ _____
Installment payments		
Motor Vehicle:	$ 0	$ _____
Credit Card: (name) _____	$ 0	$ _____
Department Store: (name) _____	$ 0	$ _____
Other _____	$ 0	$ _____
Other _____	$ 0	$ _____
Alimony, maintenance, and support paid to others	$ 0	$ _____
Payments for support of additional dependents not living at your home	$ 0	$ _____

Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other	$ 0	$
TOTAL MONTHLY EXPENSES	$ 0	$

8. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next twelve months? Yes _____ No X

If yes, describe on an attached sheet.

9. Have you paid—or will you be paying—an attorney any money for services in connection with this case, including the completion of this form? Yes _____

No xxx

If yes, how much? $ _____

If yes, state the attorney's name, address, and telephone number:

_____

_____

_____

10. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form? Yes _____ No xxx

If yes, how much? $ _____

If yes, state the person's name, address, and telephone number:

_____

_____

_____

11. Provide any other information that will help explain why you cannot pay the docket fees for your appeal: I have been in jail or continuously since 1-6-03. I have no ability to pay for a private laywer. I have had an appointed lawyer in the Colorado state court system since the beginning of the charges in this case.

12. State the address of your legal residence:

- 0 -, Inmate #84517

[prison address]
Colorado 8_____

Your daytime phone number: None

Your age: 39

Your years of schooling: 12

Your social security number: 524-15-3084

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT. 28 U.S.C. § 1746, 18 U.S.C. § 1621.

Date: 3-18-04 Signature: Wade P. Miller

Wade Miller

No. 03-836

IN THE SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF COLORADO, Petitioner

v.

WADE PAUL MILLER, Respondent

On Petition for a Writ of Certiorari to the
Colorado Supreme Court

WADE MILLER'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Colorado supreme court correctly conclude that probable cause to search a house for methamphetamine was lacking under Illinois v. Gates, 462 U.S. 213 (1983), where: an anonymous drug informant provided month-old information; there was no indication of ongoing criminal activity at the house; a second anonymous drug informant provided more detailed and recent information that defendant was making methamphetamine but in different locations than the house; methamphetamine manufacture is mobile; and the police did not independently investigate whether defendant might still be making methamphetamine at the house?

2. Did the Colorado supreme court correctly conclude that a reasonably well trained police officer would have known that the search of the house was illegal under the circumstances set forth in the prior question, such that the good faith exception of United States v. Leon, 468 U.S. 897 (1984), did not apply?

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No. 03-836

IN THE SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF COLORADO, Petitioner

v.

WADE PAUL MILLER, Respondent

On Petition for a Writ of Certiorari to the
Colorado Supreme Court

**WADE MILLER'S OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

Respondent Wade Miller ("Miller"), by his court-appointed lawyers and under Rule 15 of the rules of this court, opposes the petition ("petition") of the Colorado Attorney General for a writ of certiorari to the Colorado supreme court in People v. Wade Miller, 75 P.3d 1108 (Colo. 2003) (copy attached):

STATEMENT OF THE CASE

1. Summary.

In this methamphetamine case, the police executed two search warrants against Wade Miller, one at each of two separate locations. The state trial court upheld one warrant but invalidated the second. The state trial court invalidated

the second warrant – for a search of Miller's house – because the warrant contained insufficient information to connect the house to allegations of ongoing drug manufacture.

The prosecution challenged the trial court's ruling by direct interlocutory appeal to the state supreme court.[1] The state supreme court held that the warrant lacked probable cause under Illinois v. Gates, 462 U.S. 213 (1983), and that the good faith exception of United States v. Leon, 468 U.S. 897 (1984), did not apply because a reasonably well trained police officer would not have believed that the affidavit supported probable cause for the warrant.

The petition asserts that: the Colorado supreme court has been reluctant to follow Gates and Leon; the Colorado supreme court has issued inconsistent rulings under Gates and Leon that have provided inadequate guidance to Colorado law enforcement authorities; and Miller has negatively impacted Colorado law enforcement efforts.

Colorado follows and applies Gates and Leon. The tests in Gates (totality of the circumstances) and Leon (good faith reasonable reliance by the police) are fact-dependent. The Colorado caselaw that has evolved under Gates and Leon is consistent, provides appropriate guidance to law enforcement officials, and aids in law enforcement efforts. Miller is not a significant case in Colorado jurisprudence; it is but the most recent instance of the Colorado supreme court's implementation of the fact-based analyses under Gates and Leon.

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[1] Such interlocutory appeals are authorized by Colo.Rev.Stat. §16-12-102(2); they skip the intermediate Colorado court of appeals.

2. Description of underlying facts and lower court proceedings.

On January 6, 2003, the Cañon City, Colorado police submitted separate affidavits to obtain search warrants for Miller's house on Riverside Drive ("Riverside warrant") and for a trailer home, owned by a third person, at 926 Orchard ("Orchard warrant").[2] Evidence of methamphetamine manufacture was seized at both locations. Miller is in custody awaiting trial on charges filed in relation to both warrants. Only the Riverside warrant is at issue before this Court.

The affidavit that the police submitted to obtain the Riverside warrant is attached to the Miller opinion. 75 P.3d at 1120-22. The affidavit recites that on December 12, 2002 an informant arrested with methamphetamine-related materials during a traffic stop told the police that on December 9, 2002 the informant had smoked methamphetamine with Miller at Miller's house, and that at that time Miller had been cooking methamphetamine with materials Miller kept under his kitchen cabinets. The informant also told the police that Miller was cooking methamphetamine at the Orchard location. The informant wanted to remain anonymous. 75 P.3d at 1120.

The affidavit further recited that on January 2, 2003 a different anonymous informant told the police that Miller was manufacturing methamphetamine at three locations: the Orchard location; the house of a third-party in the nearby town of Florence, Colorado; and on property occupied by Miller's brother at a third location. The second informant provided detailed information about Miller's

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[2] Cañon City is a mountain town about a 2½ hour drive southwest of Denver. A number of state correctional facilities are located there.

manufacturing efforts at the Orchard location, including that Miller made methamphetamine on Friday nights and that recently the police had responded to a complaint of a smell in the trailer. 75 P.3d at 1121. The second informant did not mention Miller's house on Riverside Drive. The affidavit further stated that the affiant-police officer had arrested Miller in August 2002 for making methamphetamine at his Riverside Drive house.[3] 75 P.3d at 1121.

The trial court reviewed the Riverside warrant and determined that it contained only two items of information about Miller's house: (a) Miller was arrested in August 2002 when a methamphetamine lab was found in the house; and (b) on December 12, 2002 a person in custody on drug charges who wished to remain anonymous told the police that on December 9, 2002 the person smoked methamphetamine with Miller at the house, and that at the time Miller was cooking methamphetamine with supplies in the house. District Court's April 10, 2003 Order (attached). Based on this information, the trial court concluded that although the affidavit established probable cause to believe that Miller was making methamphetamine, it did not establish probable cause that Miller was doing so at the Riverside house because "[t]he affidavit is devoid of any information indicating current illegal activity at the Riverside address." Trial Court Order at 1, 4. The trial court also held that "[o]fficial belief in the existence of information showing current illegal activity at the Riverside address would be objectively unreasonable based on the information in the affidavit." Trial Court Order at 4.

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[3] Miller has pleaded to, and been sentenced for, the August 2002 charges. He is also in custody serving the sentence.

The Colorado supreme court affirmed. The court agreed that the affidavit contained only two allegations of methamphetamine activity at Riverside Drive: one in August 2002; and the other in early December 2002, a month before the affidavit was obtained and executed. 75 P.3d at 1114. The court observed that the second informant alleged that Miller was manufacturing methamphetamine at several locations but did not include Riverside Drive among them. 75 P.3d at 1115. The supreme court also observed that the second informant's knowledge of manufacturing at the Orchard location was "intimate and detailed." Id. The supreme court found that "[t]he mobility of this type of drug manufacturing is evident from the facts" because the affidavit indicated that "Miller was manufacturing methamphetamine at various places in the past," id., but the affidavit did not "tie any current criminal activity" to Miller's house. 75 P.3d at 1114. "[T]he most recent event of affidavit-alleged criminal activity occurring at Miller's residence was nearly a month old," and the affidavit "contains no information indicating that the police attempted to ascertain whether Miller's illegal activity at his residence continued after the informant's [December 9, 2002] visit, or to corroborate the informant's statements." 75 P.3d at 1114. Therefore the information about Miller's house was stale, and the Riverside warrant lacked probable cause. 75 P.3d at 1114-5.

The state supreme court wrote that "[w]e emphasize that there is no bright line rule for counting of days in considering whether the affidavit is based on stale information." 75 P.3d at 1116 n. 7. Information that focuses on one location and that demonstrates ongoing activity is not stale even if it is more than a month old.

Id. However, "the affidavit in the case before us placed the ongoing drug manufacturing at a different location from the place to be searched." Id.

Miller then examined whether the good faith exception of Leon applied. The state supreme court agreed with the trial court that "the affidavit is bereft of current information about illegal activity at Miller's house." 75 P.3d at 1116. As a result the affidavit "is a 'bare bones' affidavit regarding the existence of the crucial link between the place to be searched and current information of criminal activity or the presence of contraband there." Id. The court held that "[a] reasonably well-trained police officer is held to know that an affidavit without any relatively current information of illegal activity or the presence of contraband at a residence does not create probable cause to search the residence." Miller therefore agreed with the trial court "that the police did not reasonably rely on the warrant." Id.

SUMMARY OF ARGUMENT

The Colorado supreme court follows Gates and Leon, and has adopted the tests in those cases for the Colorado state constitution's analog to the fourth amendment to the federal constitution. The Colorado supreme court has upheld the validity of search warrants under Gates in the large majority of cases, thus mooting a need for frequent application of Leon's good faith exception for invalid warrants.

The Colorado supreme court's Gates and Leon cases articulate recurring principles that provide ample guidance for local enforcement officers who apply to state judges for search warrants. Among those principles are that the police

affidavit requesting the search warrant should contain information that links the place to be searched with the probability of criminal activity. The Colorado supreme court has routinely recognized that police work that corroborates the allegations of anonymous or first-time drug informants is valuable for that purpose.

In this case two anonymous drug informants provided information that Miller likely was involved in making methamphetamine. The first informant alleged that Miller had made methamphetamine in his house, but the allegation was a month old and did not indicate that the activity was current or ongoing. The second informant provided more recent and detailed information that Miller was making methamphetamine, but the second informant alleged that Miller was making the drug at locations other than Miller's house. Methamphetamine manufacture is known to be highly mobile. The police failed to undertake a meaningful investigation to determine whether Miller might be making methamphetamine at his house on an ongoing or current basis, as opposed to the ongoing manufacture that the second informant alleged Miller performed at a different location.

Under these circumstances, the Colorado state trial court and supreme court correctly concluded that a search warrant for Miller's house was not based on probable cause under Gates' totality of the circumstances test. The Colorado state trial court and supreme court also correctly concluded that a reasonably well trained police officer would have known that a search of Miller's house was illegal under these circumstances. This case is not about the Colorado courts'

failure to properly implement Gates and Leon; rather, it is about poor police work and the Colorado supreme court's effort to promote competent police work from a mountain town police force.

ARGUMENT

I. As required by Illinois v. Gates, the Colorado supreme court properly considered the totality of the circumstances in holding that a warrant to search a house for evidence of methamphetamine manufacture lacked probable case.

A. Illinois v. Gates

The fourth amendment to the federal constitution states in applicable part that "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." In Illinois v. Gates, 462 U.S. 213, 232 (1983), the Court held that "probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." Gates adopted a "practical, common-sense" test of whether probable cause was established under "the totality of the circumstances." Gates, 462 U.S. at 238.

B. The Colorado supreme court has developed a coherent body of Gates case law that provides ample guidance to local law enforcement.

The petition asserts that the Colorado supreme court has "been reluctant to embrace" Gates. Pet. at 3. The petition also asserts that the Colorado supreme court "has provided little guidance to the Colorado law enforcement community regarding what is necessary to establish probable cause," that the

court "has issued inconsistent opinions which have muddied the waters of probable cause," and that law enforcement efforts have been hampered as a result. Pet. at 3-4.

These assertions are incorrect. The Colorado supreme court publishes all of its opinions, and therefore the history of the Colorado supreme court's use of Gates can be reviewed. The review shows that Gates has been embraced by the Colorado supreme court, that the supreme court has created a coherent body of case law that is consistent and provides ample guidance to law enforcement, and that law enforcement efforts are promoted by the case law.

Colorado quickly applied Gates after it was issued. People v. Chase, 675 P.2d 315 (Colo. 1984), and People v. Hill, 690 P.2d 856 (Colo. 1984) (in both cases, quoting Gates, citing it to reverse trial court suppression orders, and holding that probable cause existed for search warrants used to seize drug evidence from house and motel room, respectively). In People v. Pannebaker, 714 P.2d 904, 908 (Colo. 1986), the Colorado supreme court adopted Gates as the test for the Colorado state constitution's version of the fourth amendment. Pannebaker reversed the trial court's suppression order and held that probable cause existed under Gates for warrants to search houses for drug evidence.

In Pannebaker the defendant was accused of growing marijuana under artificial lights indoors. The affidavit in support of the search warrant stated that an informant had been inside the house "within the last month." Pannebaker argued that the informant's allegations were stale because "within the last month" was too long ago to support probable cause that Pannebaker was still growing

marijuana. The Colorado supreme court rejected this argument. The informant had told the police that Pannebaker covered the windows with black plastic, in part for climate control for the growing plants. Several days before the warrants were issued, the police viewed the house from the outside and saw the black plastic on the windows. The observation "logically supported a common-sense conclusion that the harvesting of marihuana was an ongoing one." 714 P.2d at 907-08.

Since Pannebaker, the Colorado supreme court has held that probable cause existed under Gates to support a search warrant – usually for residential searches in drug cases – in the large majority of cases in which the issue has arisen. Specifically:

- People v. Atley, 727 P.2d 376 (Colo. 1986), reversed the trial court's decision that there was no probable cause for a warrant to search an apartment for illegal mushrooms. Atley held that when the search warrant affidavit is based on information provided by a citizen-witness (someone not personally involved in illegal behavior but who sees suspicious behavior by others), then the information "is presumed credible." 727 P.2d at 378. This holding is in accord with Gates, 462 U.S. at 233-34 ("if an unquestionably honest citizen comes forward with a report of criminal activity – which if fabricated would subject him to criminal liability – we have found rigorous scrutiny of the basis of his knowledge unnecessary").

- People v. Lubben, 739 P.2d 833 (Colo. 1987), reversed the trial court's suppression of evidence of methamphetamine being sold from a residence.

Probable cause existed where the primary basis of information was supplied by a first-time confidential informant because the informant described recent and continuing illegal activity, the informant made statements against his own penal interest, and the continued nature of the illegal activity was corroborated by recent "sporadic surveillance" by the police. 739 P.2d at 835-36. In part Lubben held that the information supporting the warrant was not stale because the affidavit provided information of continuous conduct in the form of drug sales occurring in April, November and December of 1985; the affidavit described heavy foot traffic to and from the residence (ascertained through the sporadic police surveillance in December 1985); and the affidavit contained some information that was less than 72 hours old. 739 P.2d at 836.

- People v. Grady, 755 P.2d 1211 (Colo. 1987), reversed the trial court's suppression of marijuana evidence seized from a residence. Probable cause existed where the confidential informant had often provided the police with reliable information in the past; the informant's allegations were recent, detailed, and based on the informant's personal observation; the informant made admissions against his own penal interests; and the police independently corroborated some of the informant's allegations. 755 P.2d at 1215-17. In part Grady held that the affidavit was not based on stale information because the affidavit showed a continuing course of illegal conduct within ten days of the warrant's issuance. 755 P.2d at 1217.

- People v. Rowerdink, 756 P.2d 986 (Colo. 1988), rejected the defendant's challenge to a residential search warrant that yielded bomb-making evidence.

Rowerdink discussed that, under Gates, 462 U.S. at 241, "corroboration of details of an informant's tip by independent police work" is a valuable factor in assessing the totality of the circumstances. 756 P.2d at 992.

- People v. Varrieur, 771 P.2d 895 (Colo. 1989), reversed the trial court's suppression of heroin taken from the defendant's pocket by search warrant. Probable cause existed because the statements of two confidential informants corroborated each other, one of the informants had provided reliable information to the police on four past occasions, and the police verified some of the information provided by one of the informants. 771 P.2d at 896-98.

- People v. Quintana, 785 P.2d 934 (Colo. 1990), reversed the trial court's suppression of marijuana evidence obtained under a residential search warrant. An informant told the police that the defendants were growing marijuana plants indoors with special lights. Quintana held that probable cause existed because the informant's allegations were detailed and police work corroborated much of the information. For instance, the police obtained utility company records that showed abnormally high electric bills for the three prior months without the customer registering a complaint, thus corroborating the allegation that defendants were using high-wattage indoor lighting. 785 P.2d at 939-40. The informant's allegations were not stale in part because the period covered by the most recent electrical bill ended one week before the search warrant was issued and executed. 785 P.2d at 939-40.

- People v. Arellano, 791 P.2d 1135 (Colo. 1990), reversed the trial court's suppression of marijuana evidence taken from a house by search warrant. The

affidavit in Arellano contained less independent police corroboration than in Quintana, but the Arellano informant had a prior reliable history and the informant's allegation in the case had a direct foundational basis. Arellano followed Gates' instruction that weakness in one factor that supports probable cause can be offset by strength in another supporting factor. Arellano, 791 P.2d at 1138, discussing Gates, 462 U.S. at 241-46.

- People v. Abeyta, 795 P.2d 1324 (Colo. 1990), reversed the trial court's suppression of marijuana evidence seized from a residence by search warrant. Abeyta found probable cause because three anonymous informants corroborated each other, the informants each described their basis of knowledge, and police surveillance corroborated some of the informants' allegations. 795 P.2d at 1328-29. The police surveillance indicated "continuing criminal activities," thus defeating Abeyta's allegation that the informants' allegations were stale. 795 P.2d at 1328.

- People v. Paquin, 811 P.2d 394 (Colo. 1991), reversed the trial court's suppression of marijuana evidence taken by search warrant from a residence. Paquin held that police corroboration of an informant's allegations is not required because probable cause under Gates "is not inexorably tied to any one element." 811 P.2d at 398. Paquin found probable cause because the informant provided detailed information about a recent drug purchase at the defendant's house, the police had used the informant in the past, and the police drove to the location identified by the informant and observed the outside of the house, outbuildings, and an abandoned vehicle that the informant had described.

• People v. Turcotte-Schaeffer, 843 P.2d 658 (Colo. 1993), also reversed the trial court's suppression of marijuana evidence seized by search warrant from a home. The police did not corroborate the informant's allegations of criminal conduct, but they corroborated enough of the informant's allegations of non-criminal conduct to support a finding that the informant was providing reliable information about the defendants' alleged criminal conduct. 843 P.2d at 661. Probable cause existed because "[c]orroboration of only non-criminal activity may support a finding of probable cause." 843 P.2d at 660, quoting Gates, 462 U.S. at 243 n. 13 ("innocent behavior frequently will provide the basis for a showing of probable cause"). Turcotte-Schaeffer also held that probable cause was supported by the informant's admissions against penal interest. 843 P.2d at 662.

• People v. Hakel, 870 P.2d 1224 (Colo.), cert. denied 513 U.S. 932 (1994), overturned a Colorado court of appeals order that had reversed a conviction due to the admission of cocaine evidence seized from a house by search warrant. While the affidavit did not allege that anyone had seen cocaine or drug-related items in the house, "the link between suspected criminal activity and a specific location to be searched may be established by circumstantial evidence and proper inferences drawn therefrom." 870 P.2d at 1229. The investigating detective was experienced, and based on a prior successful drug investigation of Hakel the detective knew that Hakel maintained drug sale records. This information supported probable cause to search Hakel's house. Id.

• People v. Henderson, 879 P.2d 383 (Colo.), cert. denied 513 U.S. 1063 (1994), affirmed Henderson's convictions for growing marijuana on his residential

property. Probable cause existed for the search warrant because four independent, detailed, and reliable tips were corroborated by police observation conducted by helicopter flyover. 879 P.2d at 392.

- People v. Pate, 878 P.2d 685 (Colo. 1994), affirmed the trial court's denial of the defendant's motion to suppress marijuana evidence obtained by search warrant executed at Pate's house. Pate rejected the defendant's argument that anonymous informants are inherently unreliable and that there must be extensive police corroboration of an anonymous informant's information. 878 P.2d at 692-3. Pate also held that Gates does not require a high level of detail from an anonymous informant, because the level of detail "is merely one of several factors" to consider. 878 P.2d at 690.

- People v. Fortune, 930 P.2d 1341 (Colo. 1997), reversed the trial court's conclusion that there was no probable cause for a residential search warrant in a case of alleged sexual assault on a child. The affidavit in support of the warrant omitted evidence about the child-accuser's troubled past. Fortune held that under the totality of the circumstances test, "corroboration of a victim's report is generally not necessary when submitting an affidavit in support of a search warrant." 930 P.2d at 1245.

- People v. Meraz, 961 P.2d 481 (Colo. 1998), reversed the trial court's exclusion of marijuana evidence taken from defendant's house by search warrant. The supreme court held that probable cause existed despite the affidavit's failure to show the confidential informant's basis of knowledge because the informant had assisted the police twice in the past, the informant's allegations

were fairly detailed and recent, the police had received a second tip from a citizen-witness that was consistent with the informant's statements, and the police corroborated some information in the two tips. 961 P.2d at 484-85.

• People v. Hebert, 46 P.3d 473 (Colo. 2002), excised from the affidavit information obtained during an impermissible warrantless search of a house in a murder case, but held that probable cause still existed under the totality of the circumstances to support a subsequent warrant-based search. Although no "direct information" connected the murder and the house, substantial circumstantial information did so. The circumstantial information, and "reasonable commonsense inferences drawn from that information," provided the connection. 46 P.3d at 483. Also, while the existence of probable cause presented "a close question" in the case, a "preference [is] accorded to warrants in 'doubtful or marginal cases.'" Id., quoting Gates, 462 U.S. at 237.

• People v. Reed, 56 P.3d 96 (Colo. 2002), reversed the trial court's ruling that there was no probable cause to support a search warrant for a motel room in a methamphetamine manufacturing case. Reed stated that the link between a suspected crime and a particular location can be established "by circumstantial evidence and proper inferences drawn therefrom." Reed 56 P.3d at 102, quoting Hakel.

• People v. Green, 70 P.3d 1213 (Colo. 2003), a burglary case, reversed the suppression of evidence taken from Green's apartment by search warrant. Probable cause to search Green's apartment existed because the owner of a recently-stolen Rolex watch saw Green wearing the watch in a local restaurant.

It was reasonable to infer that Green would keep the stolen watch with him at his residence, thereby justifying a search. Green confirmed that "direct evidence in the affidavit connecting evidence of the crime to the place to be searched" is not required. 70 P.3d at 1215. "[T]he facts alleged in the affidavit, together with reasonable inferences drawn from those facts, may be enough." Id.

* * *

Not including Miller, the Colorado supreme court has declined to find that probable cause existed under Gates in just four search warrant cases:

• People v. Leftwich, 869 P.2d 1260 (Colo.), cert. dismissed 512 U.S. 1271 (1994), affirmed the trial court's order suppressing marijuana evidence taken from a house by search warrant. The warrant was based primarily on an anonymous letter written to the police from out-of-state. The police corroborated some of the letters' non-criminal allegations but did not corroborate allegations of illegal activity. Leftwich held that there was no probable cause because: the anonymous letter provided no information about the informant; the letter did not explain the basis of the allegations; the letter did not claim that defendant had drugs in his (defendant's) house; the letter was not as detailed as the anonymous letter at issue in Gates, and Gates held that the letter there was insufficient by itself to establish probable cause; and the non-criminal information corroborated by the police was not the type of information from which criminal activity could be inferred. 869 P.2d at 1266-68.

• People v. Titus, 880 P.2d 148 (Colo. 1994), also affirmed the trial court's order suppressing marijuana evidence taken from a house by search warrant.

The warrant was based primarily on information from an anonymous informant and an unsuccessful attempt by a known police informant to purchase drugs from Titus. Titus confirmed that probable cause can be established "solely through corroboration of non-criminal activity," 880 P.2d at 150, but such corroboration was lacking in the case. The allegation of criminal activity described by the anonymous informant lacked detail. Police surveillance did not confirm the informant's allegation that Titus had frequent visitors, and Titus could have had legitimate visitors because he operated a phone repair business from his house. While Titus' conversation with the police informant supported an inference that Titus was engaged in criminal activity, the inference did not rise above reasonable suspicion. 880 P.2d at 151-2.

- People v. Randolph, 4 P.3d 477 (Colo. 2000), affirmed the trial court's suppression of search evidence, primarily because a number of buildings were searched but the affidavit did not indicate that there was criminal activity in each building. The police could have but did not narrow the scope of the buildings to be searched. Also, police surveillance did not indicate that drug-related activity was occurring. The informant's allegations of illegal conduct were uncorroborated, and the informant had no prior history of providing reliable information to the police. The informant alleged that he saw defendant smoking methamphetamine in defendant's house "some time within the past two months," but that allegation was stale in the absence of additional detail or corroboration. 4 P.3d at 482.

• People v. Kazmierski, 25 P.3d 1207 (Colo. 2001), affirmed the trial court's suppression of drug evidence seized from a home under search warrant where the affidavit contained erroneous statements made by the police in reckless disregard of the truth. The prosecution did not challenge the falsity of the statements. 25 P.3d at 1211. When the inaccurate statements were excised, the affidavit did not support probable cause because it contained nothing to tie illegal activity to the house. 25 P.3d at 1211-13.

* * *

These Colorado cases show that the petition incorrectly asserts that Colorado has not embraced Gates. The Colorado supreme court began using Gates right away after Gates was issued, and quickly adopted Gates as the test under the state constitution. Since then, the Colorado supreme court has used the totality of the circumstances test whenever a defendant challenges the probable cause basis of a search warrant. Far from being reluctant to embrace Gates, the Colorado supreme court has embraced it completely.

The Colorado cases also show that the petition incorrectly asserts that the Colorado supreme court has hampered law enforcement efforts by failing to provide adequate guidance and by issuing inconsistent decisions. The cases just described repeatedly apply several principles, often drawn directly from language in Gates:

> (a) Information provided by a crime victim or a citizen-witness supports probable cause because such information is presumptively reliable.
>
> (b) For anonymous or drug informants, probable cause can be established by a variety of factors relating to the informant, including: the level of detail provided by the informant; the age of the information; the

informant's reliability in past communications with the police; the basis for the informant's allegations; and the informant's statements against penal interest.[4]

(c) Police work that independently corroborates the allegations of an anonymous or drug informant – including allegations of non-criminal behavior – supports probable cause.

(d) Probable cause can be established by circumstantial information and reasonable inferences drawn from the information where the information and its inferences suggest a link between illegal activity and the place searched.

(e) In instances where the existence of probable cause is a close question, a finding of probable cause is preferred.

These principles provide ample guidance for law enforcement officers who want to obtain a search warrant. The Colorado supreme court's cases espouse these principles repeatedly and consistently. The cases result in a finding of probable cause a large majority of the time. On occasion, probable cause is found to be lacking under the facts present, but those occasions do not mean that the state supreme court has *sub silentio* rejected Gates; they mean that Gates is being applied as it should because the Gates test is fact-dependent. See Gates, 462 U.S. at 238 n. 11 ("[t]here are so many variables in the probable cause equation that one determination will seldom be a useful 'precedent' for another").

[4] By "drug informant," this brief means a person involved in drug activity who provides information to the police about someone else also involved in drug activity.

C. Miller correctly determined that probable cause was lacking under the totality of the circumstances.

Miller was decided in accordance with the principles articulated in the Colorado supreme court's previous Gates cases. Miller discussed the totality of the circumstances test and then examined the affidavit's allegations to see if they supported probable cause under the test. 75 P.3d at 1112-15. The affidavit for the Riverside warrant contained only two items of information that indicated criminal activity there: the August 2002 search from which Miller already faced charges; and a one-time, month-old incident related by an anonymous drug informant. A second anonymous informant alleged that Miller was making methamphetamine at three locations (including the Orchard location), but the second informant did not mention the Riverside address as one of them. The second informant's information was provided three days before the warrant was obtained and executed, and the second informant's information about Miller's drug activities at the Orchard location was detailed and recent. 75 P.3d at 1114-15, 1120-22.

The second informant's information included that Miller made methamphetamine at the Orchard location on Friday nights, 75 P.3d at 1121, thus indicating that methamphetamine manufacture was ongoing at that location. The first informant reported a single incident and did not allege facts that would indicate that methamphetamine manufacture was ongoing or current at Miller's house on Riverside Drive. Therefore the first informant's allegations were stale. 75 P.3d at 1114-15.

An important fact in Miller was that the police took no action "to ascertain whether Miller's illegal activity at his residence continued after the [first] informant's [December 9, 2002] visit, or to corroborate the [first] informant's statements." 75 P.3d at 1114. By comparison, in cases such as Pannebaker, Lubben, Abeyta, and Meraz, supra, the police conducted sufficient independent investigation to support an allegation of current or ongoing illegal activity at the place to be searched, at least when considered in the totality of the other circumstances. In Miller the police did not corroborate ~~even non~~-criminal behavior that might have supported probable cause to believe that illegal activity was ongoing at Miller's house. Compare, e.g., Turcotte-Schaeffer, 843 P.2d at 659-62 (police corroborated non-criminal behavior that, when considered with other circumstances, supported allegations of first-time drug informant that defendant was growing marijuana in his house). The only independent action that the police took here was to drive by Miller's house on one undated occasion and run a check on the license plate of a vehicle parked outside; the vehicle was not registered to Miller. 75 P.3d at 1114 & 1114 n. 4.

The lack of independent police work indicating current illegal activity at Miller's house was a significant factor under the circumstances because the second informant did not mention illegal activity on Riverside Drive. The second informant's allegations thus did not corroborate those of the first informant with respect to Miller's house. Compare Abeyta (informants corroborated each other, among other factors); Henderson, supra (same). The affidavit did not indicate whether either of the two Miller informants had provided information to the police

in the past. Compare Arellano and Paquin, supra (incomplete police corroboration was offset by prior occasions when informants provided helpful information to police). Therefore the inconsistency between the two informants' allegations could be assessed only by comparing the detail and age of their information; on that basis the second informant's allegations bore more weight.[5]

The lack of independent police work to suggest ongoing illegal activity at Miller's house was a significant factor under the circumstances for the additional reason that, as stated by the Colorado supreme court, methamphetamine manufacture is mobile. 75 P.3d at 1115. "The type of evidence and activity involved is important" in assessing probable cause under Gates. 75 P.3d at 1113 n. 3. Methamphetamine "is cheap and easy to make." www.usdoj.gov/dea/pubs/pressrel/methfact03p.html. It is made from chemicals "that can be bought over the counter at local stores," which "are mixed with other common ingredients." Id. "Small labs to cook the drug can be set up on tables in kitchens, countertops, garages or just about anywhere." Id. "The equipment used to manufacture methamphetamine can be found in a typical household." www.nmtf.us/methamphetamine/equipment.htm.[6]

The mobility of methamphetamine labs highlighted the absence of evidence of ongoing manufacture at Miller's house. Compare, e.g., Quintana,

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[5] The affidavit does not indicate whether the second informant was a citizen-witness or a drug informant. The affidavit recites that the first informant was a drug informant. 75 P.3d at 1120-22.

[6] This is the website for the North [Denver] Metro Drug Task Force, a consortium of local, state, and federal law enforcement agencies. A South [Denver] Metro Drug Task Force agent relayed the first Miller informant's allegations to the Cañon City police. 75 P.3d at 1120.

supra (case involving marijuana cultivation, where plants take a while to grow and need care while growing). The mobility of methamphetamine labs also lent more weight to the second Miller informant's allegations that Miller was making the drug at locations that did not include his house.

The petition asserts that Miller did not consider the totality of the circumstances, and instead "summarily rejected the warrant on the ground that the most recent information in it was almost a month old." Pet. at 7. The petition claims that Miller "imposed a rigid (and apparently arbitrary) timeline for determining probable cause." Pet. at 7. Miller, states the petition, creates a rule of staleness "as a matter of federal constitutional law," thus necessitating guidance from this Court about staleness under Gates. Pet. at 8-9.

The petition is incorrect. Miller imposed no rule of staleness; to the contrary Miller "emphasize[d] that there is no bright line rule for counting of days in considering whether the affidavit is based on stale information." 75 P.3d at 1116 n. 7. Miller acknowledged that information more than a month old is not stale if accompanied by allegations of "ongoing activity at the place to be searched." Id. Miller turned on the absence of allegations that there was ongoing or current illegal activity in Miller's house, 75 P.3d at 1114-5, and on the fact that the allegations "placed the ongoing drug manufacturing at a different location from the place to be searched." 75 P.3d at 1116 n. 7. Miller's conclusion was correct because: the first informant's allegations gave no indication that criminal activity was ongoing at the house; the second informant's more detailed and recent allegations stated that Miller was cooking

methamphetamine elsewhere; the second informant's allegations were supported by the mobility of methamphetamine manufacture; and the police did not develop evidence indicating that Miller was making the drug at his house on an ongoing or current basis.

The petition cites a number of staleness cases for the proposition that information much older than the first informant's allegations in Miller can support probable cause. Pet. at 10. In all of the cases that the petition cites at page 10, there was significant evidence of ongoing or current illegal activity in the place to be searched that was not present in Miller; and in most of the cases the evidence of ongoing illegal activity was supported by independent police work not present in Miller:

- United States v. Leasure, 319 F.3d 1092, 1095, 1099 (9th Cir. 2003) (fact that "initial investigation of the property began over six months prior to the search" did not make the affidavit stale; "some of the information supporting the warrant was obtained weeks or days before the warrant was executed"; police wiretap connected the location to manufacture of methamphetamine; taken as a whole the facts alleged in the affidavit showed an "ongoing" narcotics operation).

- United States v. Ruff, 984 F.2d 635, 637-38 (5th Cir.), cert. denied by Persyn v. United States, 510 U.S. 834 (1993) (two months' time before warrant was obtained did not defeat probable cause where undercover police officer continued the investigation in the interim).

- United States v. Sturmoski, 971 F.2d 452, 456-57 (10th Cir. 1992) (informant alleged facts showing an "ongoing and continuing" offense).

- Cauchon v. United States, 824 F.2d 908, 911 (11th Cir.), cert. denied, 484 U.S. 957 (1987) (informants' eleven-month old tip did not render warrant stale, because DEA agents "had observed shipments of chemicals . . . for several months," thereby indicating criminal activity was occurring "on a continuing basis").

- Lovett v. Kentucky, 103 S.W.3d 72, 78, 80 (Ky. 2003) (informant's detailed allegations showed "ongoing, long-term activity" of methamphetamine

manufacture; informant had personally observed active methamphetamine laboratory on the site "on more than one occasion" within preceding two months).

• Missouri v. Baker, 103 S.W.3d 711, 714, 719-20 (Mo. 2003) (fact that some information in affidavit was 14 months old did not render warrant stale where: active police investigation during the time since then indicated a continuing operation; police received ongoing information from citizen-witnesses; and the last information that the police obtained to support issuance of the warrant was obtained earlier the same day that the police procured the warrant).

• North Dakota v. Hage, 568 N.W.2d 741, 743-45 (N.D. 1997) (four months did not render warrant impermissibly stale where affidavit showed "protracted criminal activity"; information included reports from defendant's neighbors "regarding a large amount of traffic coming and going" from defendant's property, "particularly on weekends").

The petition also asserts that Miller forces the police to seek search warrants prematurely before information becomes stale, thereby hampering efforts to stem the proliferation of methamphetamine labs. Pet. at 11, 18. However, as stated in Miller's footnote 7, the first informant's month-old information would not have been stale if the police had made an effort to develop some evidence indicating that Miller might be continuing to make methamphetamine in his house. Delay accompanied by police investigation would have aided law enforcement efforts, not hampered them.

The issue in Miller is not the legal question of staleness, but the factual consequences of incomplete police work. The police in Miller performed essentially no investigation of their own with respect to the Riverside warrant. For instance: they did not conduct any surveillance of the house; they did not conduct surveillance of about a half-dozen people identified in the affidavit as

being involved in Miller's manufacturing efforts;[7] and they did not interview Miller's neighbors to see if the neighbors had noticed strange smells or an unusual number of visitors. Miller thus reminds the police to perform the relatively small amount of work necessary under Gates to submit affidavits that will support probable cause and hence result in charges that can defeat fourth amendment attack. See, e.g., Reed, 56 P.3d at 101-02 (2002 Colorado supreme court case finding that probable cause existed for search that yielded methamphetamine lab in motel room and truck).

Miller correctly considered the totality of the circumstances under Gates. Miller reached the appropriate result under the circumstances. It did so by following principles that the Colorado supreme court has consistently articulated in compliance with Gates. Certiorari should be denied.

II. The Colorado supreme court correctly held that a reasonably well trained police officer would not have relied on the invalid search warrant.

A. United States v. Leon

United States v. Leon, 468 U.S. 897, 922 (1984), held that the exclusionary rule does not apply when a law enforcement officer executes a search in good faith reliance on a warrant that turns out to be invalid. The officer's reliance must be objectively reasonable. Id. An officer does not act in good faith if "a reasonably well trained officer would have known that the search

[7] For example, the second informant alleged that Miller's brother and the brother's girlfriend purchased precursor chemicals for Miller. 75 P.3d at 1121. The affidavit reflected no effort to confirm that allegation, which could have led to additional drug arrests as well as determined whether precursors were being delivered to Miller's house on Riverside Drive.

was illegal despite the magistrate's authorization." 468 U.S. at 922 n. 23. The focus of Leon is deterring improper behavior by the police. Leon, 468 U.S. at 916.

Leon identified four categories where its good faith rule did not apply: (1) the affidavit included statements that the police knew were false or in reckless disregard of the truth; (2) the issuing magistrate abandoned his judicial role; (3) the warrant failed to sufficiently specify the place to be searched or the things to be seized; or (4) an objectively reasonable officer could not have believed that probable cause existed. 468 U.S. at 923, 926.

B. The Colorado supreme court has developed a coherent body of caselaw that is consistent with Leon and that provides ample guidance to local law enforcement.

As with Gates, the petition asserts that the Colorado supreme court has been reluctant to embrace Leon, and that the supreme court has issued inconsistent decisions that provide inadequate guidance to law enforcement and so impede effective law enforcement. Pet. at 3-4. These assertions are incorrect.

Six Colorado supreme court cases address Leon:

- People v. Leftwich, supra, a 1994 case, addressed Leon after holding that the search warrant lacked probable cause under Gates.[8] Only the fourth of Leon's four exceptions was at issue. 869 P.2d at 1169-70. Leftwich involved an

[8] The Colorado supreme court cited Leon shortly after Leon was decided in 1984, see, e.g., Pannebaker, 714 P.2d at 906 (1986 case), but did not address Leon as pertinent here until 1994 because between 1984 and 1994 the Colorado supreme court upheld search warrants under Gates.

anonymous tip, and the detective responsible for the warrant had not previously sought a warrant based on an anonymous tip. 869 P.2d at 1265 n. 6. When the detective applied for the warrant, the district attorney and fellow police officers doubted that probable cause existed. 869 P.2d at 1272. At the suppression hearing the detective conceded that he knew that the anonymous tip did not contain probable cause to search the residence and that his own investigation did not corroborate that Leftwich was engaged in illegal activity. Therefore the detective knew or should have known that the affidavit did not establish probable cause, and the evidence was not admissible under Leon's good faith exception to the exclusionary rule. 869 P.2d at 1269-71.

• People v. Altman, 960 P.2d 1164 (Colo. 1998), presumed that the warrant lacked probable cause, but held that the police acted in good faith under Leon's fourth exception. The police observed indoor plant-growing equipment being transported to Altman's house in June – a time of year in Colorado when plants are grown outside. The equipment was brought to Altman's house in a rental car even though two cars registered in Altman's name were parked at the house. The lead detective in the case, who was experienced and well-trained in drug cases, checked utility records and found that electricity usage at the house was two to three times higher than normal since Altman had moved in. Under these circumstances, the Colorado supreme court held that the affidavit used to procure the search warrant was not so deficient that a reasonable police officer could not have relied on it. 960 P.2d at 1171-72. The court compared the case to Leftwich, and noted that the affidavit in Altman did not "rest upon unsupported

allegations of criminal activity made by an unknown informant." 960 P.2d at 1171. Unlike in Leftwich, "all facts recited in the [Altman] affidavit were observed by law enforcement officers." Id.

In a footnote, Leftwich stated that although Gates and Leon had different goals,[9] "in the vast majority of cases" Leon's fourth exception would not save police action taken under a warrant invalidated under Gates because "both tests utilize a reasonableness standard to review the facts in an affidavit." 869 P.2d at 1271 n. 12. Altman tempered this footnote by stating that Leftwich "did not, however, declare that an affidavit that is ultimately determined to lack probable cause could never be found sufficient to invoke the good faith exception." 960 P.2d at 1170 n. 4.

• In People v. Blehm, 983 P.2d 779 (Colo. 1999), an arrest warrant was vacated by the court but the police were unaware of the court's order because of clerical error by court employees. The police found cocaine when they arrested Blehm under a warrant that they believed was valid. Blehm declined to suppress the cocaine evidence, holding that the purpose of Leon is to deter improper police conduct, and that under Leon the police could not be held responsible for error by court employees. 983 P.2d at 794-97. Blehm also held that Leon provides the test under the Colorado state constitution. 983 P.2d at 795.

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[9] Specifically, Leftwich noted that Gates focused on the reasonableness of the magistrate's probable cause determination while Leon focused on the reasonableness of the police decision to obtain the warrant in the first place. 869 P.2d at 1271 n. 12.

• People v. Randolph, supra, addressed Leon's fourth exception after probable cause was found to be absent under Gates. As discussed above, the Randolph affidavit was based primarily on the allegations of a first-time drug informant whose allegations were uncorroborated; also, the police could have but did not narrow which buildings should be searched among a number of buildings. Randolph held that the police could not reasonably have relied on the warrant because they "failed to corroborate the details in the affidavit, and they failed to narrow the search with particularity." 4 P.3d at 484. The police did not exercise "independent good judgment to assure [themselves] that the affidavit was sufficient." Id.

• People v. Kazmierski, supra, applied Leon's first exception, and held that the police could not rely in good faith on a warrant issued on the basis of knowing or reckless falsehoods in the affidavit submitted to obtain the warrant. 25 P.3d at 1213-14.

• In People v. Gall, 30 P.3d 145 (Colo. 2001), the affidavit in support of the search warrant did not provide the correct address of the apartment to be searched. However, the affidavit contained a banner on each page (apparently a header or footer) that included the correct address. The proper address was written in the proposed search warrant submitted with the affidavit. Gall held that the absence of the correct address from the text of the affidavit did not render the affidavit so deficient that a reasonable police officer could not have relied on the warrant in good faith. 30 P.3d at 149-52. Gall did not specify which exception to

Leon was at issue, but it appears to have addressed the third exception; namely whether the place to be searched was described with sufficient particularity.

* * *

These Colorado cases show that the petition incorrectly asserts that Colorado has not embraced Leon. The Colorado supreme court did not begin using Leon as quickly as Gates, but that delay was because the Colorado supreme court did not have reason to do so – it did not invalidate a search warrant under Gates until ten years after Leon was issued. As with Gates, Leon has been adopted as the test under the state constitution.[10] As with Gates, the Colorado supreme court uses Leon when police reliance on an invalid warrant is at issue.

Colorado's Leon cases also show that the petition incorrectly asserts that the Colorado supreme court has hampered law enforcement efforts by failing to provide adequate guidance and by issuing inconsistent decisions. Colorado's Leon cases establish these principles:

> (a) Leon's purpose is to deter police misconduct, not court misconduct. Therefore evidence will not be suppressed if the source of the fourth amendment violation is the court rather than the police.
>
> (b) Colorado follows Leon's first exception that the police cannot rely in good faith on a warrant obtained by false statements.
>
> (c) Colorado has not yet considered Leon's second exception (magistrate abandons judicial role).
>
> (d) Colorado has applied Leon's third exception and has held that the police can rely in good faith on a warrant issued under an affidavit that did

[10] Leon is also codified in a Colorado statute, Colo.Rev.Stat. §16-3-308, which presumes that the police act in good faith if they act pursuant to a warrant. Randolph, 4 P.3d at 483.

not request a search of the correct address, where the correct address was otherwise contained in the affidavit, the proposed warrant was for a search at the correct address, and the police knew the correct address.

(e) With respect to Leon's fourth exception, which is the exception at issue in Miller, the Colorado supreme court has articulated these principles:

• Taking Leftwich, Altman, and Randolph together, police reliance on the warrant is reasonable if the police perform some work that supports the inference that illegal activity is occurring in the place to be searched. If the affidavit is based only on uncorroborated allegations by an anonymous tipster (about whom the police know nothing) or a first-time drug informant (with whom the police have no prior experience), then police reliance may not be reasonable under the circumstances.

• If there is no probable cause under Gates then usually a reasonable police officer cannot rely on the warrant, but that will not always be the case.

These principles provide sufficient guidance to law enforcement. The police know that they will be held accountable only for their own error, not court error. Good faith reliance is not lost by immaterial police error, such as the error in the Gall affidavit. On the other hand, false statements in an affidavit will not be tolerated. With respect to the fourth exception, the message to the police is that the Colorado supreme court trusts work done by the police but that the court is unwilling to place similar trust in the uncorroborated assertions of anonymous informants or drug informants. In the latter situation, the Colorado supreme court wants the police to obtain enough additional information to allow a reasonably well trained police officer to infer that drug activity probably is occurring in the house. Colorado's Leon fourth exception cases thereby turn on the viewpoint of the police, not the viewpoint of the informant. This principle promotes Leon's focus on police behavior.

C. Miller correctly determined that the good faith exception did not apply under the circumstances.

Miller was decided in accordance with the principles articulated in the Colorado supreme court's previous Leon cases. Miller discussed Leon's four exceptions, identified that the fourth exception applied, and then examined the affidavit's allegations to see if a reasonably trained police officer would have concluded that they supported probable cause to search Miller's house. 75 P.3d at 1112, 1115-17. Miller concluded that a reasonably well-trained police officer would not have relied on the affidavit to establish probable cause to search the house because the affidavit contained no indication of ongoing or continuing illegal activity there. 75 P.3d at 1117.

Miller's conclusion is consistent with the rest of Colorado's Leon cases. As in Randolph, the police here faced the possibility that drug activity was occurring in one or more of several buildings, but the police did not try to narrow the scope of the locations even though the police could have done so. A reasonably well trained police officer brings training and experience to bear when evaluating a story that the officer is told by a drug informant – especially an anonymous or first-time drug informant. An important component of the officer's evaluation is obtaining other information that the officer can use to test the informant's story. No test information was available here because the Cañon City police did not perform work to confirm or contradict the allegations of the first

Miller informant. Accordingly a reasonably well trained police officer had no professional basis to rely on the first Miller informant's allegations.[11]

The petition argues that Miller erred in calling the affidavit a "bare bones" affidavit because "bare bones" means "devoid of factual support," and the affidavit was not devoid of factual support. Pet. at 15. In Altman, the Colorado supreme court stated that "[a] bare bones affidavit is said to contain wholly conclusory statements devoid of facts from which a magistrate can independently determine probable cause." 960 P.2d at 1170. The Miller affidavit was devoid of factual support that Miller was engaged in ongoing or current methamphetamine manufacture in his house, particularly when compared to the affidavit's information about the Orchard location. As the trial court found and the state supreme court agreed, Miller seemed to be making methamphetamine, but the question was where. The quantity of allegations in the affidavit did not compensate for the lack of quality in the allegations as to where Miller might be acting among a choice of several possible locations. Because the affidavit did not contain allegations that connected current criminal activity to Miller's house, the affidavit was "bare bones" concerning Miller's house.

The petition argues that Miller was incorrectly decided because it was a 4-3 decision. The petition argues that the good faith exception necessarily applies when reasonable jurists reviewing the affidavit after the fact disagree whether a

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[11] There is no indication that the Cañon City police officer who prepared the Riverside warrant affidavit even met the first informant. The affidavit states that the informant's allegations were relayed to the Cañon City police by a phone call from an agent of the South Denver Metro Drug Task Force. 75 P.3d at 1120.

reasonably trained police officer could objectively rely on it. Pet. at 16.[12] This argument stems from a statement in Leon that the affidavit there "related the results of an extensive investigation and, as the opinions of the divided panel of the Court of Appeals make clear, provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause." 468 U.S. at 926. "Under these circumstances, the officers' reliance on the magistrate's determination of probable cause was objectively reasonable." Id. In Miller there was no extensive investigation, and consequently the Miller dissent does not by itself establish reasonable reliance by the police.

The petition also contends that Colorado's Leon jurisprudence is faulty because it applies Leon's fourth exception too frequently. Petition at 14. The petition is most concerned with Leftwich's footnote 12. That footnote was tempered by Altman's footnote 4, which the petition does not acknowledge. Colorado's application of Leon's fourth exception also needs to be viewed in context. The exception is one of four Leon exceptions, and the petition does not allege that Colorado applies the other three exceptions too often. Moreover, the fourth exception cannot be used to invalidate a search if the affidavit is upheld under Gates. As demonstrated by the previous of Colorado's Gates cases, affidavits are sustained under Gates in the large majority of Colorado cases. As

[12] Because of the fact-dependent nature of the Leon and Gates tests, dissents are not uncommon in close cases. See, e.g., Gall (4-3 vote for prosecution); Kazmierski (5-2 vote for defendant); Altman (4-3 for prosecution); Fortune (5-2 for prosecution); Titus (4-3 for defendant); Henderson (5-2 for prosecution); Pate (5-2 for prosecution); Hakel (4-3 for prosecution); and Leftwich (5-2 for defendant).

discussed, the Colorado supreme court has not often addressed Leon because the court so frequently uses Gates to uphold search warrants. Therefore Leon's fourth exception will rarely invalidate a search when considered in the appropriate, larger context of fourth amendment challenges to search warrants.

The result reached in Miller would not change regardless of whether Colorado employs Leon's fourth exception more often than the petition would like. A reasonably well trained officer should have known that a search of Miller's house was illegal because of the lack of informant allegations of ongoing activity in the house, the second informant's allegations that Miller was making methamphetamine elsewhere, the mobility of methamphetamine labs, and the lack of independent police work to develop evidence from which current drug activity in the house could be inferred. See Leon, 468 U.S. at 922 n. 23 ("our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization").

As with the Gates argument, the petition argues that the Leon portion of Miller promotes hasty police action to avoid staleness, thus defeating complete and thorough police investigation. Pet. at 16-17. The Cañon City police performed no independent investigation, let alone a complete and thorough investigation, and there is no indication that they had plans to conduct an independent investigation. As was the case under the Gates argument, above, delay coupled with a police investigation would have aided law enforcement efforts, not hampered them. Police investigation would have provided the

missing information that a reasonably well trained police officer would want in order to rely on the first informant's uncorroborated allegations.

As with the Gates portion of Miller, the Leon portion of Miller is designed to encourage the police to do their jobs properly. Miller, 75 P.3d at 1117 (court stating that result in case "has the salutary effect of requiring the police" to obtain information to link the place to be searched with criminal activity; that link "is at the heart of the Fourth Amendment"). Miller thus promotes Leon's focus on deterring police misconduct. Leon is not an excuse for poor police work.

Last, the petition contends that a comparison of the Riverside and Orchard warrants shows that the two police officers who applied for the separate warrants worked together in drafting their affidavits, and that the police executed the Riverside warrant only after executing the Orchard warrant and finding incriminating materials at the Orchard location. Pet. at 17. This argument implies that the Riverside warrant was conditioned on the valid Orchard warrant.

The argument is incorrect. The affidavit for the Riverside warrant did not mention the Orchard warrant. The police applied for and obtained the Riverside warrant on its own; the police could and did execute the Riverside warrant regardless of what was found at the Orchard location. In addition, under Malley v. Briggs, 475 U.S. 335, 345 (1986), and Altman, 960 P.2d at 1169 n. 3, the pertinent time period under Leon is when the police apply for the warrant, not when the police later execute the warrant. The results of the Orchard search cannot remedy the police's failure to reasonably rely on the Riverside warrant when the police applied for the Riverside warrant. Finally on this point, the

petition's request to consider the Orchard warrant affidavit in conjunction with the Riverside warrant affidavit violates the rule that the court is "restricted to the information contained within the four corners of the affidavit." Miller, 75 P.3d at 1116. Accord, e.g., United States v. Bertrand, 926 F.2d 838, 841 (9th Cir. 1991) (same four corners rule). The petition does not controvert the rule. The affidavit for the Riverside warrant is the only affidavit relevant to the Leon analysis for the Riverside warrant.

CONCLUSION

Respondent Wade Miller requests that the Court deny the petition for a writ of certiorari and remand the case to the Colorado courts so that he can be tried on the charges pending against him.

Dated: April 26, 2004

Respectfully submitted:

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The PEOPLE of the State of Colorado, Plaintiff–Appellant,

v.

Wade Paul MILLER, Defendant–Appellee.

No. 03SA107.

Supreme Court of Colorado, En Banc.

Sept. 8, 2003.

State filed interlocutory appeal of an order of the District Court, Fremont County, Julie G. Marshall, J., suppressing evidence of methamphetamine manufacture seized from defendant's home. The Supreme Court, Hobbs, J., held that: (1) search warrant for defendant's home lacked probable cause, and (2) good faith exception to exclusionary rule was inapplicable.

Affirmed and remanded.

Coats, J., filed dissenting opinion, in which Kourlis and Rice, JJ., joined.

1. Criminal Law ⇐1139, 1158(4)

When reviewing an order suppressing evidence, Supreme Court defers to the trial court's findings of facts, if supported by the record, but reviews the trial court's legal conclusions de novo.

2. Criminal Law ⇐394.4(6)

The test for application of the good faith exception to the exclusionary rule imposes upon the officer involved in obtaining and executing the search warrant a continuing duty to exercise reasonable professional judgment; the officer must read the affidavit in support of the warrant and the warrant carefully and must be objectively persuaded that the warrant is sufficient. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7.

3. Criminal Law ⇐394.4(6)

In determining whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization, which determination is necessary in analyzing whether good faith exception to exclusionary rule applies, a reviewing court should take all the circumstances surrounding the issuance of the warrant into account. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7.

4. Searches and Seizures ⇐113.1

Because there is no mechanical formula for determining whether there is probable cause to support issuance of a search warrant, reasonable minds may differ on the question of whether a particular affidavit establishes probable cause. U.S.C.A. Const. Amend. 4; West's C.R.S.A. Const. Art. 2, § 7.

5. Searches and Seizures ⇐191

A reviewing court should uphold the validity of a search warrant if the affidavit accompanying the warrant creates a substantial basis for the conclusion that probable cause existed. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7.

6. Searches and Seizures ⇐121.1

A search warrant must establish probable cause to believe that contraband or evidence of criminal activity is located in the place to be searched at the time of the warrant application, not merely some time in the past. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7.

7. Searches and Seizures ⇐113.1

Probable cause for issuance of a search warrant exists when an affidavit for a warrant alleges sufficient facts to warrant a person of reasonable caution to believe that contraband or evidence of criminal activity is located at the place to be searched. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7.

8. Searches and Seizures ⇐113.1

To determine whether probable cause existed to support issuance of a search warrant, reviewing court examines the totality of the circumstances; this analysis does not lend itself to mathematical certainties or bright line rules, rather, it involves a practical, common-sense determination whether a fair probability exists that a search of a particular place will reveal contraband or other evi-

dence of criminal activity. U.S.C.A. Const. Amend. 4; West's C.R.S.A. Const. Art. 2, § 7.

9. Searches and Seizures ⇐121.1

Whether information is current or stale plays an important role in the totality of the circumstances analysis employed to determine whether probable cause for issuance of search warrant existed. U.S.C.A. Const. Amend. 4; West's C.R.S.A. Const. Art. 2, § 7.

10. Searches and Seizures ⇐121.1

Whether the information contained in an affidavit in support of a search warrant is stale and cannot support probable cause depends on the factual circumstances and the type of crime. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7.

11. Criminal Law ⇐394.4(1)

Typically, when the police conduct a search without a valid warrant, the exclusionary rule operates to suppress the fruits of the search, unless the search falls under an exception to the warrant requirement. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7.

12. Criminal Law ⇐394.4(1)

Exclusionary rule, which typically operates to suppress fruits of search conducted without a valid warrant, is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the aggrieved; whether to invoke the exclusionary rule is an issue separate from the question of whether Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7.

13. Criminal Law ⇐394.4(1)

Application of the exclusionary rule, which typically operates to suppress fruits of search conducted without a valid warrant, is restricted to those areas where its remedial objectives are thought most efficaciously served. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7.

14. Criminal Law ⇐394.4(5.1)

Exclusionary rule, which typically operates to suppress fruits of search conducted without a valid warrant, does not apply to situations where the police act in objectively reasonable, good faith reliance on a warrant, even if a court later holds that the warrant is defective; in such circumstances, excluding the fruits of the search would not have a deterrent effect on the police. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7.

15. Criminal Law ⇐394.4(6)

Statute permitting admission of otherwise suppressible evidence if the evidence was seized as the result of a good-faith mistake or of a technical violation creates presumption that an officer was acting in good faith if he or she acted pursuant to a warrant; this presumption may be rebutted if the officer failed to undertake the search in an objectively good faith belief that it was reasonable. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7; West's C.R.S.A. § 16–3–308(4)(b).

16. Criminal Law ⇐394.4(6)

If no reasonable officer would have relied upon the search warrant, then objective good faith is absent and the good faith exception offers no shelter to application of exclusionary rule, which typically operates to suppress fruits of search conducted without a valid warrant. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7; West's C.R.S.A. § 16–3–308(4)(b).

17. Criminal Law ⇐394.4(6)

Fact that a magistrate acted favorably upon a search warrant request is of no moment in the determination of whether the officer acted with objective reasonableness so as to come within good faith exception to exclusionary rule, because the question of reasonableness is to be judged as of the time of warrant application and thus without consideration of the fact that the magistrate thereafter issued a warrant. U.S.C.A. Const. Amend. 4; West's C.R.S.A. Const. Art. 2, § 7; West's C.R.S.A. § 16–3–308(4)(b).

18. Criminal Law ⇐394.4(6)

There are four circumstances under which an officer may not reasonably rely on a warrant: (1) where the issuing magistrate was misled by a known or recklessly made falsehood, (2) where the issuing magistrate wholly abandoned the judicial role, (3) where the warrant is so facially deficient that the officer cannot reasonably determine the particular place to be searched or things to be seized, or (4) where the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7; West's C.R.S.A. § 16–3–308(4)(b).

19. Controlled Substances ⇐149

Search warrant for defendant's home lacked probable cause, as only information linking alleged methamphetamine manufacturing activity to defendant's home was information from anonymous informant that was almost one month old when police applied for warrant to search defendant's home, and current information in affidavit in support of warrant regarding defendant's alleged illegal activity was for another location that was not defendant's home. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7.

20. Searches and Seizures ⇐113.1

A proper search warrant affidavit must allege sufficient facts to warrant a person of reasonable caution to believe that evidence of criminal activity is located at the place to be searched. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7.

21. Searches and Seizures ⇐191

In the vast majority of cases, if a court ascertains that a substantial basis for determining probable cause did not exist, the court will reach the conclusion that the officer unreasonably relied on the affidavit. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7.

22. Criminal Law ⇐394.4(6)

Police officers could not have reasonably relied on search warrant, which contained stale information concerning alleged manufacture of methamphetamine in defendant's home, and thus good faith exception to exclusionary rule did not apply; a reasonably well-trained officer was held to know that an affidavit without an relatively current information of illegal activity or presence of contraband at a residence did not create probable cause to search the residence. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7; West's C.R.S.A. § 16–3–308(4)(b).

23. Criminal Law ⇐394.4(6)

Application of the good faith exception to allow evidence that would be suppressed otherwise turns on whether it was "objectively reasonable" for the officer to rely on the warrant; thus, police officers involved in obtaining and executing a search warrant have a continuing duty to exercise reasonable professional judgment. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7; West's C.R.S.A. § 16–3–308(4)(b).

24. Criminal Law ⇐394.4(6)

The good-faith exception, which allows admission of evidence that would be suppressed otherwise requires officers to have a reasonable knowledge of what the law prohibits. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7; West's C.R.S.A. § 16–3–308(4)(b).

25. Criminal Law ⇐1134(2)

Like the trial court, the reviewing court, in considering whether officer's reliance on search warrant was objectively reasonable, as necessary for good faith exception to exclusionary rule to apply, is restricted to the information contained within the four corners of the affidavit in support of the warrant. U.S.C.A. Const.Amend. 4; West's C.R.S.A. Const. Art. 2, § 7; West's C.R.S.A. § 16–3–308(4)(b).

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Justice HOBBS delivered the Opinion of the Court.

In this interlocutory appeal, filed pursuant to C.A.R. 4.1 and section 16-12-102(2), 6 C.R.S. (2002), the prosecution appeals the district court's order suppressing evidence of methamphetamine manufacture seized from defendant Wade Miller's home. Nearly a month expired between the event the informant related and application by the police for the warrant. The trial court set aside the warrant for lack of probable cause and suppressed the evidence seized—for lack of good faith police reliance on the sufficiency of the warrant—because the only information linking the illegal activity to the place to be searched, Miller's home, was stale. We agree with the trial court and affirm its suppression order.

I.

On January 6, 2003, the police obtained and executed a search warrant for Miller's home. During the search, the police discovered a methamphetamine laboratory, arrested Miller, and charged him with possessing and operating the lab.[1]

The warrant was based on a police affidavit reciting information from an anonymous informant. The informant said that, on December 9, 2002, at Miller's home, he smoked some methamphetamine Miller had just finished manufacturing there. The informant also stated that Miller kept methamphetamine manufacturing supplies in his kitchen cabinets. The affidavit also recited another informant's information—current at the time of application for this warrant on January 6, 2003—that Miller was manufacturing methamphetamine at a location other than his home. But the affidavit (attached as Exhibit A) contained no information more current than December 9, 2002,[2] regarding manufacture or the presence of contraband at Miller's home.

The record made at the suppression hearing discloses that the police obtained and executed warrants for the other location and Miller's home on January 6, but the affidavit for search of the other location inexplicably contains more current information regarding manufacture of the drug by Miller at his home than was contained in the affidavit for search of his home.

As to the affidavit for search of Miller's home, the trial court found that: (1) the police had recited sufficient reliable information to implicate Miller in the manufacture of methamphetamine; (2) but the information regarding drug manufacturing by Miller at his home was stale; and (3) the police could not have reasonably relied on it in applying for the warrant. The trial court concluded that the warrant lacked probable cause, and the good faith exception to the exclusionary rule did not apply because no reasonably objective police officer would have relied on the warrant's sufficiency. It therefore granted Miller's motion to suppress the evidence obtained from search of his home.

II.

We agree with the trial court that the warrant in this case was not based on probable cause, and the police could not have reasonably relied on it, because the information regarding drug manufacturing at Miller's home was stale when the police applied for the warrant, and no reasonable police officer would have relied on it. Accordingly, the exclusionary rule operates in this case, not the good faith exception to it.

A. Deficient Warrant and the Good Faith Exception

[1] When reviewing a suppression order, we defer to the trial court's findings of facts,

1. Based on the search of his home, the Amended Information charged Miller with manufacturing a schedule two controlled substance, possession of manufacturing chemicals or supplies, possession of a schedule II control substance, and unlawful possession of a schedule II controlled substance. § 18-18-405(1), (2)(a), 6 C.R.S. (2002). The prosecution also charged Miller with identical counts, based on the search of the residence of Miller's friend. The validity of this other search warrant is not before us.

2. On August 14, 2002, the police previously searched Miller's home pursuant to a warrant and seized evidence of methamphetamine manufacturing there.

if supported by the record; and we review the trial court's legal conclusions de novo. *People v. Schall*, 59 P.3d 848, 851 (Colo.2002); *People v. D.F.*, 933 P.2d 9, 13–14 (Colo.1997).

We address this case using the framework set forth by *People v. Randolph*, 4 P.3d 477, 482 (Colo.2000), and *People v. Altman*, 960 P.2d 1164, 1167 (Colo.1998). *Randolph* upheld a trial court's suppression order because the warrant there lacked probable cause and the police, under the circumstances in that case, could not have reasonably relied on it. In contrast, *Altman* applied the good faith exception and allowed the evidence to be admitted at trial, even though it was derived from execution of a warrant that may have lacked probable cause.

The application for the warrant in *Randolph* failed to particularize the building where the evidence of illegal activity might be found; pertinent here, the anonymous tip received in that warrant was stale (two months old). We concluded that the police could not have reasonably believed that the "bare bones" affidavit they presented to the magistrate in that case established probable cause.

In contrast, the affidavit in *Altman* contained recent information the police had personally observed, suggesting a reasonable inference that the defendant was growing marijuana in his home.

> Officer Landolt's experience and training led him to believe that the purchase of equipment commonly associated with indoor marijuana cultivation at the height of the outdoor growing season, the high electrical usage, the potentially suspicious use of a rental car, and the defendant's previous brushes with the law all created a reasonable inference of marijuana cultivation.

Altman, 960 P.2d at 1172. Though the warrant may have lacked probable cause, an issue we did not reach because of the applicability of the good faith exception, we concluded that police reliance on the warrant in *Altman* was objectively reasonable.

[2, 3] The test for good faith reliance on the warrant imposes upon the officer involved in obtaining and executing the search warrant a continuing duty to exercise reasonable professional judgment. *Randolph*, 4 P.3d at 483. The officer must read the affidavit and warrant carefully and must be objectively persuaded that the warrant is sufficient. *Id.* In determining whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization, a reviewing court should take all the circumstances surrounding the issuance of the warrant into account. *Id.*

As we did in *Randolph*, we now address the law of probable cause and the good faith exception for police reliance on a warrant. Then, we apply that law to the warrant and the seizure of evidence in this case.

B. Probable Cause

[4, 5] The Fourth Amendment to the United States Constitution and article II, section 7, of the Colorado Constitution prohibit the issuance of a search warrant except upon probable cause supported by oath or affirmation particularly describing the place to be searched and the things to be seized. U.S. Const. amend. IV; Colo. Const. art. 2, § 7; *see also* § 16–3–303, 6 C.R.S. (2002) (specifying the requirements for a search warrant). Because there is no mechanical formula for determining probable cause, reasonable minds may differ on the question of whether a particular affidavit establishes probable cause. *Altman*, 960 P.2d at 1167. A reviewing court should uphold the validity of a warrant if the affidavit accompanying the warrant creates a substantial basis for the conclusion that probable cause existed. *People v. Reed*, 56 P.3d 96, 101 (Colo.2002).

[6, 7] The warrant must establish probable cause to believe that contraband or evidence of criminal activity is located in the place to be searched at the time of the warrant application, not merely some time in the past. *People v. Erthal*, 194 Colo. 147, 570 P.2d 534 (1977). Probable cause exists when an affidavit for a search warrant alleges sufficient facts to warrant a person of reasonable caution to believe that contraband or evidence of criminal activity is located at the place to be searched. *Altman*, 960 P.2d at 1167.

[8] To determine whether probable cause exists, we examine the totality of the circumstances. *Id.* This analysis does not lend itself to mathematical certainties or bright line rules; rather, it involves a practical, common-sense determination whether a fair probability exists that a search of a particular place will reveal contraband or other evidence of criminal activity. *Id.*

[9, 10] Whether information is current or stale plays an important role in the totality of the circumstances analysis. *See Randolph*, 4 P.3d at 482; *People v. Mervaz*, 961 P.2d 481, 484 (Colo.1998); *People v. Hearty*, 644 P.2d 302, 311 (Colo.1982); *see also People v. Green*, 70 P.3d 1213, 1215 (Colo.2003) (warrant was obtained one day after the defendant was seen wearing the stolen item). Whether the information is stale and cannot support probable cause depends on the factual circumstances and the type of crime.[3] *People v. Lubben*, 739 P.2d 833, 836 (Colo. 1987) ("In determining whether information is stale, the court must consider the type of crime the facts reveal.").

C. Good Faith Exception

[11–13] Typically, when the police conduct a search without a valid warrant, the exclusionary rule operates to suppress the fruits of the search, unless the search falls under an exception to the warrant requirement. *People v. Winpigler*, 8 P.3d 439, 443–44 (Colo.1999). The exclusionary rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the aggrieved; whether to invoke the exclusionary rule is an issue separate from the question of whether Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct. *United States v. Leon*, 468 U.S. 897, 906, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Application of the exclusionary rule is restricted to those areas where its remedial objectives are thought most efficaciously served. *Id.* at 908, 104 S.Ct. 3405.

[14] As a result, the exclusionary rule does not apply to situations where the police act in objectively reasonable, good faith reliance on a warrant, even if a court later holds that the warrant is defective. *Randolph*, 4 P.3d at 483. In such circumstances, excluding the fruits of the search would not have a deterrent effect on the police. *Leon*, 468 U.S. at 919–20, 104 S.Ct. 3405.

[15, 16] The Colorado General Assembly has codified a version of the *Leon* test that permits admission of otherwise suppressible evidence if the evidence was seized "as the result of a good-faith mistake or of a technical violation." § 16–3–308(1), 6 C.R.S. (2002). The *Leon* "objectively reasonable" standard and the statutory "good faith" standard are substantially similar. *Randolph*, 4 P.3d at 483; *People v. Leftwich*, 869 P.2d 1260, 1272 (Colo.1994). Colorado's statute, however, creates a presumption that an officer was acting in good faith if he or she acted pursuant to a warrant. *See* § 16–3–308(4)(b), 6 C.R.S. (2002); *Randolph*, 4 P.3d at 483. This presumption may be rebutted if the officer failed to undertake the search in an objectively good faith belief that it was reasonable. *Randolph*, 4 P.3d at 483; *Altman*, 960 P.2d at 1169. If no reasonable officer would have relied upon the warrant, then objective good faith is absent and the good faith exception offers no shelter. *Altman*, 960 P.2d at 1169.

[17] Accordingly, the police must act in objective good faith when they apply for the warrant; the fact that a magistrate ultimately approved the warrant is not controlling.

> [T]he fact that a magistrate acted favorably upon a warrant request is of no moment in the determination of whether the officer acted with objective reasonableness because *the question of reasonableness is to be judged as of the time of warrant application* and thus without consideration of the fact that the magistrate thereafter issued a warrant.

3. The type of evidence and activity involved is important. Some types of evidence the police seek to obtain through a search warrant may be relatively immune from becoming stale, for example, DNA evidence at the specified location.

Leftwich, 869 P.2d at 1269 n. 11 (emphasis added); *accord Malley v. Briggs*, 475 U.S. 335, 345, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (the *Leon* analysis focuses on "whether a reasonably well-trained officer ... would have known that his affidavit failed to establish probable cause and *that he should not have applied for the warrant.*")(emphasis added); *see Altman*, 960 P.2d at 1169 n. 3.

[18] There are four circumstances under which an officer may not reasonably rely on a warrant: (1) where the issuing magistrate was misled by a known or recklessly made falsehood; (2) where the issuing magistrate wholly abandoned the judicial role; (3) where the warrant is so facially deficient that the officer cannot reasonably determine the particular place to be searched or things to be seized; or (4) where the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. *Leon*, 468 U.S. at 923, 104 S.Ct. 3405; *Randolph*, 4 P.3d at 483–84. We have characterized warrants that fall under the fourth circumstance as "bare bones" warrants. *E.g., Randolph*, 4 P.3d at 482.

This case implicates the fourth circumstance, because the trial court found that the information in the affidavit was stale, and, consequently, the police could not have reasonably believed that it established probable cause for the search of Miller's house.

D. Application In This Case

1. Lack of Probable Cause

[19, 20] A proper search warrant affidavit must allege sufficient facts to warrant a person of reasonable caution to believe that evidence of criminal activity is located at the place to be searched. *Leftwich*, 869 P.2d at 1265. Although the affidavit for the warrant in this case alleged past criminal activity at Miller's residence, it did not tie any current criminal activity or the presence of contraband to Miller's residence.

The affidavit for the warrant related information that Miller was engaged in a course of manufacturing methamphetamine, but the most recent event of affidavit-alleged criminal activity occurring at Miller's residence was nearly a month old at the time the police applied for the warrant. As the trial court found, the affidavit related two stale allegations of criminal activity at Miller's home: the fact that he was arrested there in August 2002 after the police found a methamphetamine lab on the premises, and the fact that an anonymous informant on December 9, 2002, told the police he had smoked methamphetamine at Miller's house and observed Miller in the process of manufacturing a batch of methamphetamine.

Thus, the most recent evidence of criminal activity at Miller's residence was almost a month old when the police applied for the warrant on January 6, 2003. The affidavit contains no information indicating that the police attempted to ascertain whether Miller's illegal activity at his residence continued after the informant's visit, or to corroborate the informant's statements. The affidavit relates one unsuccessful attempt to verify that Miller continued to live at the house to be searched.[4]

Under these circumstances, the excessive delay between the informant's December 9, 2002 observations and the police application of January 6, 2003 for the warrant renders the information stale and unreliable. *See Randolph*, 4 P.3d at 482 (evidence that the defendant smoked methamphetamine at his house was stale, as it occurred "only some time in the last two months."); *People v. Stoppel*, 637 P.2d 384, 391 (Colo.1981) (month-old observations by non-anonymous informant that the defendant had bomb making supplies in his residence were stale and insufficient to support probable cause).[5]

4. The affidavit reports that a police officer went to the house and saw a vehicle registered to "James E. and Marsha L. Miller" parked at the residence. The affidavit provides no basis to believe that "James" Miller is the same person as "Wade" Miller. In addition, the affidavit does not state when the police made this observation, so the information is presumptively stale. *See Randolph*, 4 P.3d at 482 (affidavit's account of a witness statement is stale, because it did not include the time frames when the witness made his observations).

5. *People v. Erthal*, 194 Colo. 147, 570 P.2d at 534 (1977) is instructive on this point. In that case, the defendant was accused of stealing some tools

The current information contained in the affidavit about Miller's illegal drug manufacturing activity related to a different location from his home. The affidavit recites that on January 3, 2003, a few days before the police searched Miller's house, a different anonymous informant informed police that Miller was manufacturing methamphetamine at a trailer located elsewhere.[5] The information from that informant related intimate and detailed knowledge of Miller's manufacturing activities and did not mention anything about Miller manufacturing the drug at his house, or storing it there. In fact, Miller was arrested and charged for manufacturing methamphetamine at the other location as a result of the search conducted there pursuant to a separate warrant issued the same day as the warrant for search of his home. However, the warrant for search of Miller's home set forth nothing but stale information regarding manufacture at his home.

In contrast to the month involved here, our course of conduct cases address a much shorter time between the occurrence of criminal activity set forth as the basis for the warrant and the police application for the warrant. *People v. Schmidt*, 172 Colo. 285, 473 P.2d 698 (1970), involved evidence that a defendant was continuously dealing drugs from his room, and a lapse of five days between the time that an informant saw drugs in the room and the time that the police sought the warrant. *Id.* at 292, 473 P.2d at 701. Likewise, *People v. Hearty*, 644 P.2d 302 (Colo.1982), involved a lengthy conspiracy to extort money, corroborated by a series of transactions over several months, with the final transaction occurring eight days before the police sought a search warrant. *Id.* at 311.

In *People v. Ball*, 639 P.2d 1078 (Colo. 1982), the police observed literally hundreds of suspected drug transactions at the defendant's residence, with the last transaction seven days before the police sought a warrant. *Id.* at 1080, 1083. Finally, in *Lubben*, 739 P.2d 833 (Colo.1978), the affidavit involved a situation in which the police found methamphetamine in the defendant's residence in April; received additional information that the defendant possessed methamphetamine or drug paraphernalia in November and December of the same year; conducted "sporadic surveillance" of the defendant in December and observed unusually heavy foot traffic to and from the defendant's residence; and received a tip from an informant that seventy-two hours before they applied for a search warrant, the informant saw methamphetamine in the defendant's residence. *Id.* at 836.

Here, the affidavit mentions two instances of illegal drug manufacture at Miller's house, one four months old and one nearly a month old. The mobility of this type of drug manufacturing is evident from the facts of this case. The affidavit recites that Miller was manufacturing methamphetamine at various places in the past. As our case law demonstrates, without relatively current information of criminal activity or contraband at the location to be searched, probable cause is typically lacking for issuance of the warrant.

The warrant for search of Miller's home lacked probable cause. We now address whether the good faith exception to the exclusionary rule should apply to this case.

2. Inapplicability of Good Faith Exception

[21, 22] In the vast majority of cases where a substantial basis for determining probable cause does not exist, the police cannot rely on the good faith exception:

> [I]n the vast majority of cases, if a court . . . ascertains that a substantial basis for determining probable cause did not exist,

from a former employer. The police observed similar tools in the defendant's shop shortly after the theft. However, they waited two months before obtaining and executing a warrant to search the defendant's shop. We held that this two-month-old observation was stale, and did not support probable cause. *Id.* at 535. "Due to the lapse of nearly two months between the deputy's observation . . . and the issuance of the warrant, there was no probable cause to believe that stolen goods were in the shop at the time the warrant was executed." *Id.*

6. This second informant also told the police that Miller was manufacturing at several other locations; however, the informant did not tell the police when Miller was manufacturing at those locations, so these additional allegations are stale.

the court will reach the conclusion that the officer unreasonably relied on the affidavit.

Leftwich, 869 P.2d at 1271 n. 12.

[23, 24] Application of the good faith exception to allow evidence that would be suppressed otherwise turns on whether it was "objectively reasonable" for the officer to rely on the warrant. *Id.* Thus, police officers involved in obtaining and executing a search warrant have a continuing duty to exercise reasonable professional judgment. *Randolph*, 4 P.3d at 483; *Altman*, 960 P.2d at 1170. The good-faith exception requires officers to have a reasonable knowledge of what the law prohibits. *Leon*, 468 U.S. at 919 n. 20, 104 S.Ct. 3405.

The affidavit in this case is a "bare bones" affidavit regarding the existence of the crucial link between the place to be searched and current information of criminal activity or the presence of contraband there.[7] *Randolph*, 4 P.3d at 482. As the trial court observed, the affidavit is bereft of current information about illegal activity at Miller's house:

> The "good faith" exception does not cure this deficiency. The affidavit is devoid of any information indicating current illegal activity at [Miller's house]. Official belief in the existence of information showing current illegal activity at [Miller's house] would be objectively unreasonable based on the information in the affidavit.

A reasonably well-trained police officer is held to know that an affidavit without any relatively current information of illegal activity or the presence of contraband at a residence does not create probable cause to search the residence. Consequently, we agree with the trial court that the police did not reasonably rely on the warrant.

[25] The prosecution urges us to consider information outside the affidavit to establish that the police met the objective good faith standard for admission of the seized evidence.[8] This information was included in the affidavit to search the house of Miller's friend, or was discovered as a result of that search, and was "overlooked" in the affidavit for this warrant.[9] However, like the trial court, we are restricted to the information contained within the four corners of the affidavit. *See Reed*, 56 P.3d at 101 (courts must consider whether reliance on the warrant was objectively reasonable, based on the contents of the warrant, and cannot inquire into

7. We emphasize that there is no bright line rule for counting of days in considering whether the affidavit is based on stale information. When the information in the affidavit focuses on one location, demonstrates ongoing activity over several months at that place, and the search warrant is for that place, courts have held that observations dating back more than one month were not stale. For example, the court in *United States v. Iiland*, 254 F.3d 1264, 1268–69 (10th Cir.2001)(activity ongoing over a considerable period of time) pointed out that the "affidavit tended to show that Mr. Iiland kept the drugs he sold in the storage unit, and that he was still renting and visiting the unit a few days before the warrant was issued." Another court pointed out that "[n]othing suggested either that the conspirators would not continue in their operation or that the laboratory would be moved." *United States v. Ruff*, 984 F.2d 635, 638 (5th Cir.1993). In *United States v. Le*, 173 F.3d 1258, 1266 (10th Cir. 1999), the reports of two informants were consistent in stating ongoing activity at the place to be searched. In contrast, the affidavit in the case before us placed the ongoing drug manufacturing at a different location from the place to be searched.

8. The prosecution's brief to us argues that the officer who sought and executed the warrant acted in objective good faith, in part because "he possessed more knowledge of criminal activity at [Miller's house] than he stated in his warrant; to wit: that he personally spoke with another informant on December 20, 2002, who told him that Miller continues to manufacture methamphetamine *in his home.*" (emphasis in original). People's Opening Brief at 8, *People v. Miller*, No. 03SA107.

9. For example, the warrant for the friend's house recites that an informant told the police on December 20 that Miller had continued to manufacture methamphetamine since his August arrest, and Miller primarily manufactures at his home and at his friend's residence. The People urge us to consider this information, arguing:

> A comparison of Officer Lopez's probable cause affidavit for the search of [Miller's residence] and Deputy Jolliffe's probable cause affidavit for the search of [Miller's friend's residence] clearly demonstrate that the two officers shared information and worked together in composing their affidavits. It is also clear that Officer Lopez simply *overlooked stating an important detail* when composing his affidavit. (emphasis added). People's Opening Brief at 6.

the police's subjective good faith). Thus, we decline to bolster the insufficient affidavit in this case with additional information not conveyed to the magistrate in the application for this warrant.

Given the facts of this case, applying the exclusionary rule to suppress the evidence seized has the salutary effect of requiring the police to use in the affidavit for the search warrant current information they have available, or may obtain, to establish the link between the place to be searched and the existence of criminal activity or contraband there. Establishing this link is at the heart of Fourth Amendment protections.

III. Conclusion

Accordingly, we affirm the trial court's suppression order and remand this case for further proceedings consistent with this opinion.

Justice COATS dissents, and Justice KOURLIS and Justice RICE join in the dissent.

Justice COATS, dissenting:

Today the court declares inadmissible, as the product of an illegal search, the physical evidence of the defendant's manufacture of methamphetamine in his home. The majority does so despite discovery of the evidence during the execution of a warrant to search the defendant's home, issued by a neutral magistrate, in reliance upon a three and one-half page, single-spaced, typewritten affidavit, and despite acknowledging a finding of sufficient reliable information in the affidavit to implicate the defendant in the manufacture of methamphetamine. Although the affidavit undeniably alleges observations of the defendant's continuous, and very recent, production of methamphetamine at a number of locations, the majority finds fatal to the search of his home the failure of the affidavit to document observations at that specific location for almost a month. Because I believe the majority opinion betrays a fundamental misunderstanding of the purpose and scope of the staleness inquiry; amounts to a substantial departure from the precedent of not only this court but federal and state courts across the country; and evinces a general hostility toward the good faith exception to the exclusionary rule, I respectfully dissent.

Ordinarily, it would be enough for reversal of a suppression order that the search fell within the good faith exception to the exclusionary rule. *People v. Altman*, 960 P.2d 1164 (Colo.1998). Because of the majority's staleness analysis, however, I feel obliged to explain why there was actually a substantial basis for the magistrate's finding of probable cause and issuance of the warrant. Although I do not consider the existence of probable cause to search the defendant's home a close question in this appeal, I do consider it important to emphasize that a warrant is not erroneously issued at all as long as there is at least a "substantial basis" to support it. *People v. Gall*, 30 P.3d 145, 150 (Colo.2001).

While specific statutes or rules may impose formal time limitations on the execution of a search warrant, *see, e.g.*, § 16–3–305(6), 6 C.R.S. (2002) (ten days from date of issuance); Crim. P. 41(d)(V)(VI) (same), the Fourth Amendment has never been construed to assign a life-span to information disclosing the commission of a crime. "Staleness" is simply a concept that expresses the reality that information making it likely that items connected to a crime will be found at a particular time and place may lose its force with the passage of time. Information amounting to probable cause to search for evidence of a crime at a particular point in time may therefore no longer amount to probable cause to search at a later point in time. Probable cause, however, "is not determined by merely counting the number of days between the time of the facts relied upon and the warrant's issuance." *United States v. Rahn*, 511 F.2d 290 (10th Cir.1975). Rather, the likelihood that evidence of a crime will still be found in the same place is a function of a host of variables that are unrelated to the calendar. *See Andresen v. State*, 24 Md.App. 128, 331 A.2d 78 (1975). Chief among them is the nature of the criminal activity at issue.

Along with virtually every other jurisdiction considering the question, we have often acknowledged that the passage of time becomes less significant where information indi-

cates criminal activity of a protracted or continuous nature. *See, e.g., People v. Erthal*, 194 Colo. 147, 570 P.2d 534 (Colo.1977) ("There was no information that the suspect continuously engaged in criminal activity or continued to use feloniously obtained tools, factors which might have justified the belief that the stolen items would still be in the location searched."); *United States v. Johnson*, 461 F.2d 285 (10th Cir.1972) (time has no meaning in determining probable cause apart from the nature and length of criminal activity and the nature of property to be seized). Time lapses running weeks, or even months, have been upheld where affidavits for search warrants indicated probable cause of ongoing criminal enterprises, of a wide variety. *See generally* 2 Wayne R. LaFave, *Search & Seizure* § 3.7(a), 344–46 nn. 17–26 (3d ed.1996) (illegal paramilitary operations, gambling operations, ongoing fraud or loansharking operations, ongoing processing or repeated sales of drugs, liquor, or guns, repeated thefts or receipt of stolen property).

Especially with regard to illegal drugs, probable cause of ongoing sales and production has been expressly distinguished from probable cause of mere use. *Compare Andresen*, ("The observation of half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in . . . .") *with United States v. Hyde*, 574 F.2d 856 (5th Cir.1978) (holding in context of widespread and continuing conspiracy to smuggle drugs, "The upshot of this rule to practical application has been to allow fairly long periods of time to elapse between information and search warrant of criminal activity.") In light of the nature of the manufacturing or growing process and the nature of a conspiracy or enterprise to produce and/or sell drugs, information that is months old has regularly been held sufficient to establish probable cause to support a search. *See, e.g., United States v. Iiland*, 254 F.3d 1264 (10th Cir.2001) (three months since cocaine sale); *United States v. Smith*, 266 F.3d 902 (8th Cir.2001) (three months since cocaine sale); *United States v. Ruff*, 984 F.2d 635 (5th Cir.1993) (two months since observation of meth lab); *United States v. Dixon*, 247 F.Supp.2d 926 (S.D.Ohio 2002) (two months since cocaine sale); *United States v. Seibert*, 779 F.Supp. 366 (E.D.Pa.1991) (three months since meth sale at defendant's trailer); *Lovett v. Commonwealth*, 103 S.W.3d 72 (Ky.2003) (two months since observation of meth lab); *State v. Hage*, 568 N.W.2d 741 (N.D.1997) (four months since supplier of meth lab ingredients named); *State v. Wilson*, 120 Or.App. 382, 852 P.2d 910 (1993) (six weeks since observation of meth lab); *People v. Wilson*, 182 Cal.App.3d 742, 227 Cal.Rptr. 528 (1986) (six weeks since observation of strong odor of meth).

The affidavit in this case indicated ongoing operations. It made clear that the affiant officer had already seized a meth lab from the defendant's home in August, as a result of which the defendant was charged with manufacturing and distributing and was released on bond. It also contained detailed information from an informant who had been in the defendant's home in December, four months later, that the defendant was still regularly manufacturing methamphetamine at both his home and the Orchard location. The affidavit further contained detailed information from another informant from early January, just days before the issuance and execution of the warrant, that the defendant and another man were continuing to manufacture methamphetamine at the Orchard address, as well as several other locations. Unlike the majority, I consider it permissible to infer from this information that the defendant had not, in the last month, mysteriously stopped manufacturing methamphetamine at his home and removed all evidence of his operations there, while continuing to maintain all of his other operations.

Where the location to be searched is a suspected drug dealer's home, often no greater nexus to that specific location is required because experience dictates that drug dealers ordinarily keep their supply, records, and monetary profits at home. *See generally* 2 LaFave, at 379. It literally defies commonsense, where there is good reason to believe that the defendant (while out of jail on bond for doing the same thing) continues to use methamphetamine, to acquire a supply of the materials required for its manufacture, and in fact to manufacture the drug at a number

of locations simultaneously; and where he clearly manufactured the drug in his home before being arrested and was observed still doing so at least four months afterward; to hold that there is not even a reasonable probability that his home has continued to be one of his manufacturing sites, or at least still contains evidence of his ongoing manufacturing operations. The majority's decision to limit the life-span of probable cause to a set number of days following the last information of drug manufacturing at a particular location is not only contrary to our prior holdings but fails to appreciate the significance of being a continuing and ongoing operation.

While I am concerned about the majority's attempt to distinguish this case from our prior "course of conduct" cases on the grounds that we have not previously decided a case involving the same number of days between observation and issuance, *see* maj. op. at 1115, I am much more concerned by its holding that no well-trained police officer could reasonably believe the information to still establish probable cause. The majority not only reduces the probable cause determination to a mechanical (if not arbitrary) counting process; it forces police officers to predict precisely where the court will draw the cutoff line. Even if it did not fly in the face of an abundance of counter-examples from courts across the country, this holding can only serve to encourage officers to rely on their own counting rather than the appropriate assessment of the nature and circumstances of the criminal activity by a neutral magistrate. Having a good faith exception serves little purpose if acting in good faith means nothing more than accurately predicting the ultimate conclusion of the courts.

The exception to the exclusionary sanction does not apply, nor should it, if the magistrate misbehaves or is misled by police misbehavior, or if the affidavit is so lacking in indicia of probable cause—as to "bare bones"—as to render official belief in its existence entirely unreasonable. In this case, the trial court did not apply the good faith exception because it believed that the month-long interval between observations of manufacturing in the defendant's home and issuance of the warrant not only rendered that information stale but made unreasonable any belief by trained officers that the affidavit contained probable cause for the search. In upholding that ruling, the majority in effect finds it unreasonable for well-trained officers to rely on a probable cause determination by a neutral magistrate that would be upheld as fully justified by other justices of the jurisdiction's highest court.

The good faith exception to the exclusionary rule springs from the realization that the suppression of evidence as a sanction is unlikely to significantly modify executive branch behavior undertaken in objectively reasonable good faith. *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). In addition to avoiding an extremely high cost to society, with little corresponding benefit, the exception has an additional salutary effect of promoting a judicial preference for warrants, by largely insulating executive branch officers from the mistakes of judicial magistrates. Not only does the majority's narrow interpretation nullify virtually any beneficial effect of the good faith exception; its unrealistic time and place restrictions on the probable cause determination severely undercut incentives to seek warrants in cases of ongoing methamphetamine operations. If delay by the police, in order to accumulate more and better information, is rewarded by disallowing information as stale, police will be faced with the dilemma whether to act on less information while it is more fresh, relying on the exigencies of the situation to excuse judicial approval in advance. Because I consider the majority holding to be wrong, both as a matter of law and as a matter of policy, and because I believe it will have a substantial negative impact on combating a serious social problem in this jurisdiction, I respectfully dissent.

I am authorized to say that JUSTICE KOURLIS and JUSTICE RICE join in this dissent.

Appendix A

STATE OF COLORADO
COUNTY OF FREMONT
ss. AFFIDAVIT

Appendix A—Continued

In support of a request for the issuance of a SEARCH WARRANT FOR: 406 Riverside Drive, a yellow house with blue trim, located in the City of Canon City, County of Fremont, State of Colorado to search for Methamphetamine, ephedrine based pills, psudoephedrine based pills, drug paraphernalia, Methamphetamine lab equipment, precursor chemicals, money, records, weapons, receipts, and any other items that would relate to the use, possession, manufacturing, or trafficking of drugs.

THE UNDERSIGNED AFFIANT, BEING FIRST DULY SWORN UPON OATH, DEPOSES AND SAYS:

Your Affiant is Andrew J. Lopez, a Police Officer with the Canon City Police Department. I have been employed as a police officer for approximately seven years and am currently assigned to the narcotics investigations division of the Canon City Police Department. I have attended at least 192 hours of narcotics training involving the searches of vehicles and homes containing Methamphetamine labs, money, precursor chemicals, lab equipment, multiple grams of illegal drugs, and large amounts of money. I have also experienced first hand searches of vehicles and homes containing Methamphetamine labs, money, precursor chemicals, lab equipment, multiple grams of illegal drugs, and large amounts of money.

On December 12th, 2002 I received a phone call from South Metro Drug Task Force Agent Angela Fritz, who advised she had information regarding the manufacture of methamphetamine in Canon City. Agent Fritz advised the following:

- She had two persons in custody after they were reported to have been purchasing large quantities of ephedrine and pseudoephedrine based pills at a store in her area
- They stopped the two persons at a traffic stop and saw in plain view numerous boxes of pills and a glass methamphetamine pipe
- One of the two persons, wishing to remain anonymous, told her the following:
  - ▲ On Monday, December 9th, 2002, they were in Wade Miller's house, 406 Riverside Drive, Canon City, Fremont County, Colorado, and Wade was actively manufacturing methamphetamine in the house
  - ▲ They smoked some methamphetamine with Wade, which he had just manufactured
  - ▲ Wade had Toluene, Coffee Pots, Muriatic Acid, Anhydrous Ammonia and Salt
  - ▲ Wade's batch of methamphetamine was "salting out"
  - ▲ Wade drive's [sic] a Blue Ford Bronco
  - ▲ Wade is keeping methamphetamine manufacturing supplies under the kitchen cabinets in his house
  - ▲ They are a methamphetamine user and manufacturer and were collecting pills to manufacture methamphetamine
  - ▲ Wade Miller has also been cooking at an address on Orchard, at the entrance to Mountain View Park, in the last trailer to the East
  - ▲ The trailer belongs to Valerie Shetrone and a man named Nick (last name unknown)
  - ▲ Valerie and Nick allow Wade and Jacob Lopez to manufacture methamphetamine in the trailer
  - ▲ The trailer has an addition to the rear with some sort of aluminum cover over it
  - ▲ Jacob Lopez has been recently arrested, but Wade continues to manufacture in the trailer
  - ▲ Approximately 2 weeks ago they personally observed Sudafed pills, Xylol, a "bubbler," Red Devil Lye, Tubing, and Glassware in this trailer home
  - ▲ Wade has been regularly manufacturing methamphetamine at either the Riverside or the Orchard address

Agent Fritz went on to say the second person arrested, wishing to remain anonymous, offered Jim Sampson's current location, stating that Jim was at the Econo Lodge on the North end of Pueblo, and had a warrant for his arrest.

I advised Canon City Police Department Detective Jeff Worley of the information I received. Detective Worley identified the

Appendix A—Continued

Orchard address as 926 Orchard, with a trailer number believed to be # C, and described it as two White trailer houses with Brown trim, connected by some kind of walkway between the two, with a round metal building attached on the North side. Detective Worley found one car parked at the trailer, bearing Colorado license plate number 629CRH, which came back to a Claudia J. Shetrone and a Valeria R. Holtz of 926 Orchard Avenue. Detective Worley also went to 406 Riverside where he found an 85 Ford 2 door, bearing Colorado license plate number NOVLU, which came back to James E. and Marsha L. Miller. Detective Worley indicated that there were several people around the property at the time he went by.

I recognized all the chemicals and terms referred to by the first anonymous party as being integral parts of the methamphetamine manufacturing process. I know Jacob Lopez was just recently arrested and Wade Miller is currently out on bond on charges of manufacturing and distributing methamphetamine, after I found a meth lab in his home on August 14th, 2002. I also know Jacob Lopez was arrested following the seizure of this meth lab, when he approached 406 Riverside and was found to have methamphetamine and paraphernalia with him. I also know Jim Sampson was wanted on a warrant for manufacturing meth at his shop at 2027 South Street, located [sic] on November 22nd, 2002. I recalled Wade Miller's Criminal History and knew he was arrested in Canon City 1992[sic] for 2 counts of Distributing Marijuana, and Distribution of Dangerous Drugs (Methamphetamine).

On January 3rd, 2002[sic] Fremont County Sheriff's Deputy Mike Joliffe spoke to a person, wishing to remain anonymous, who advised the following:

- ▲ Wade Miller 05/25/64 is driving a navy blue, Ford, Bronco
- ▲ Wade Miller and Jacob Lopez manufacture methamphetamine together
- ▲ Jeff West owns a fake penis that has a fake bladder, that West, Jacob Lopez and Wade Miller use to pass urinalysis test [sic] as part of the M.A.P.P. program

Appendix A—Continued

- ▲ Wade Miller uses his boss's credit card to purchase urine from an online business through the internet
- ▲ Wade Miller and Jacob Lopez use a trailer located on Orchard Avenue in Canon City. This trailer is next to Mountain View Park. The trailer has a metal rounded building located at the back of the trailer
- ▲ The trailer they use to manufacture methamphetamine belongs to Nick Bufmack
- ▲ Bufmack stated to Miller, that it is ok to make meth in the trailer, but he wants to know when they are doing it
- ▲ Bufmack has a girlfriend named Val (the only name this person has ever heard her called)
- ▲ Val has a mother that lives in the area of the trailer and has in the past reported smelling strange smells coming from the area
- ▲ Recently the police responded to one complaint of the smell and Jacob Lopez was hiding in the trailer until they left
- ▲ A person by the name of Jim Woldridge purchases the chemicals and ephedrine based pills for Wade Miller
- ▲ Wade Miller manufactures methamphetamine on Friday nights, but only if he has at least 1000 ephedrine based pills to cook with
- ▲ Wade Miller in the past has gone to a home in Florence that belongs to Cindy and Rod Steele
- ▲ Miller and Rod would manufacture methamphetamine in the shed on the property
- ▲ Rod has anhydrous ammonia tanks buried in the back yard
- ▲ Wade Miller's brother Chuck Miller and his girlfriend/wife with a last name of Washburn, will go to Salida and Denver to purchase Ephedrine based pills for Wade
- ▲ Chuck and Washburn live on some property up in Tallahassee
- ▲ Wade will go up on the property on occasion to manufacture methamphetamine

Appendix A—Continued

- ▲ Wade has anhydrous ammonia tanks buried on the property
- ▲ Wade is sharing anhydrous ammonia tanks with John Messer
- ▲ Messer lives in Williamsburg.

On this same date Fremont County Sheriff's Deputy Jay Dexter arrested Wade Miller for driving under revocation. Miller was arrested driving a blue, Ford, Bronco that registered to Harmony Britton. I arrested Harmony Britton for possession of Methamphetamine after she approached 406 Riverside following the seizure of the meth lab at the residence on August 14th, 2002.

I recognized all the chemicals and terms referred to by the first anonymous party as being integral parts of the methamphetamine manufacturing process. I know Jacob Lopez was just recently arrested and Wade Miller is currently out on bond on charges of manufacturing and distributing methamphetamine, after I found a meth lab in his home on August 14th, 2002. I have received several anonymous tips since Wade Miller bonded out that he has continued to manufacture and sell methamphetamine. I also arrested Jacob Lopez following the seizure of this meth lab, when Jacob approached 406 Riverside there was methamphetamine and paraphernalia on his person.

Wade Miller's Criminal History shows the following:

1992 arrested for marijuana distribution and distribution of dangerous drugs.

1994 arrested for DUI.

2002 arrested for distribution and manufacturing of schedule II, possession of schedule II, possession of narcotic equipment, driving under the influence of drugs, marijuana and unlawful manufacturing of schedule II.

I know the anonymous person that spoke to Deputy Jolliffe is not the same as the anonymous person I spoke to, because they are of different genders.

Appendix A—Continued

Subscribed and sworn before me this 6th Day of January, 2003.

The PEOPLE of the State of Colorado, Plaintiff–Appellee,

v.

Steven M. ST. JAMES, Defendant–Appellant.

No. 99CA2069.

Colorado Court of Appeals, Div. IV.

Dec. 5, 2002.

Rehearing Denied Jan. 23, 2003.

Certiorari Denied Aug. 25, 2003.

Defendant was convicted in the District Court, Arapahoe County, James F. Macrum, Jr., Gerald J. Rafferty, JJ., of sexual exploitation of a child and sexual assault on a child by one in a position of trust. Defendant appealed. The Court of Appeals, Dailey, J., held that: (1) defendant could be convicted of sexual exploitation of a victim even though he had not developed the film he had taken of the victim; (2) other bad acts evidence of defendant's possession of money and the victim's drug dealing was relevant to show aspects of the relationship demonstrating defendant's influence over the victim, her desire to please him, and, ultimately, the power defendant had in the relationship; and (3) other bad acts evidence of tracking records kept by defendant's community corrections facility was properly admitted to corroborate the victim's testimony that defendant was with her at certain times and places.

Affirmed.

District Court Fremont County Combined Courts 136 Justice Center Road, Room 103 Canon City, Colorado 81212	
THE PEOPLE OF THE STATE OF COLORADO, vs. WADE MILLER, Defendant.	FILED IN COMBINED COURTS APR 10 2003 Fremont County, Colorado
Prepared by the Court: Fremont County, State of Colorado 136 Justice Center Road, Room 103 Canon City, CO 81212 (719)269-0100	Case No. 03CR11 Division 2 Courtroom 301
ORDER	

This matter comes before the Court upon a Motion to Suppress the evidence obtained from 406 Riverside Drive, Canon City, Colorado. The Court has considered the arguments and authorities cited. The Motion is granted.

The Affidavit dated January 2, 2002 clearly establishes probable cause to believe Wade Miller was manufacturing methamphetamines. However, it fails to establish probable cause that it was occurring at 406 Riverside. The only information in the affidavit related to 406 Riverside is:

"On December 12, 2002, I received a phone call from South Metro Drug Task Force Agent Angela Fritz, who advised she had information regarding the following:

- She had two persons in custody after they were reported to have been purchasing large quantities of ephedrine and pseudoephedrine based pills at a store in her area

- They stopped the two persons on a traffic stop and saw in plain view numerous boxes of pills and a glass methamphetamine pipe

- One of the two persons, wishing to remain anonymous, told her the following:

    - On Monday, December 9, 2002, they were in Wade Miller's house, 406 Riverside Drive, Canon City, Fremont County, Colorado, and Wade was actively manufacturing methamphetamine at the house

    - They smoked some methamphetamine with Wade, which he had just manufactured. Wade had Toluene, Coffee Pots, Muriatic Acid, Anhydrous Ammonia and Salt

      Wade's batch of methamphetamine was "salting out"

    - Wade drive's a Blue Ford Bronco

    - Wade is keeping methamphetamine manufacturing supplies under the kitchen cabinets in his house

    - They are a methamphetamine user and manufacturer and were collecting pills to manufacture methamphetamine"

Also, the affidavit mentions several times that a search warrant was executed at 406 Riverside on August 14, 2002 and numerous people were arrested at that home when a methamphetamine lab was located there.

The District Attorney argues that the information in the affidavit is not stale because it shows a continuing course of conduct or, alternatively that even if the information is insufficient, the good faith exception applies. (§16-3-308, 6 C.R.S. (2002)).

In support of her argument that the information was not stale, the District Attorney cites People v. Reed, 56 P.3d 96 (Colo. 2002), People v. Lubben, 739

P.2d 833 (Colo. 1987), and United States v. Mascarenas, 30 Fed. Appx. 784, 2002 WL172685 (10th Cir. Colo.). Each of these cases has more compelling facts than are contained in this case. In Reed, in support of the search warrant for Room 12 requested on November 6, 2001 the Court notes the affidavit stated the Defendant moved from one motel room (Room 3) where remnants of a methamphetamine lab had been found to room 12 of the same motel on November 4, 2001, that the Defendant was seen smoking outside Room 12 two days prior to the search, which is a common practice for methamphetamine manufacturers to avoid igniting vapors and that a few days prior to the search request an empty acetone container and ephedrine was found in Reed's vehicle. In Lubben, which does discuss a continuing series of illegal activities, the court notes the affidavit should be read as indicating that during the month preceding the application for the warrant, officers conducted "sporadic" surveillance" and observed heavy foot traffic consistent with drug trafficking, between the two residences, and within 72 hours of the search the Confidential Informant observed methamphetamine at one of the addresses. In Mascarenas, in addition to reflecting ongoing and continuous drug activity the affidavit also showed recent drug activity at the places to be searched. These cases do not support the issuance of a warrant in this case where the only information tying the methamphetamine lab to the Riverside address is approximately one month prior to the application for the warrant with subsequent investigation yielding no additional information as to that residence

but rather information as to a different address. People v. Randolph, 4 P.3d 477 (Colo. 2000)

The "good faith" exception does not cure this deficiency. The affidavit is devoid of any information indicating current illegal activity at the Riverside address. Official belief in the existence of information showing current illegal activity at the Riverside address would be objectively unreasonable based on the information in the affidavit. (People v. Altman, 960 P.2d, 1164 (Colo. 1998.)

Therefore the Motion to Suppress is granted. The evidence seized pursuant to this affidavit may not be used by the prosecution in support of criminal charges.

BY THE COURT:

Julie G. Marshall 4-10-03
Julie G. Marshall, Judge

cc: District Attorney
Liles

No. 03-836

IN THE SUPREME COURT OF THE UNITED STATES

The People of the State of Colorado, Petitioner

v.

Wade Paul Miller, Respondent

On Petition for a Writ of Certiorari to the
Colorado Supreme Court

PROOF OF SERVICE BY RESPONDENT WADE PAUL MILLER

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In accordance with Sup.Ct.R. 29.3, I, Dean Neuwirth, a member of the bar of this court, certify that on April 26, 2004, a copy of Wade Paul Miller's Opposition to Petition for Writ of Certiorari in this case was served on the lawyers listed below by mail deposited with the U.S. Postal Service, first class postage prepaid, addressed to counsel at the addresses listed below. I further certify that, on the same date, a copy of Wade Paul Miller's Motion for Leave to Proceed *In Forma Pauperis* (with attached supporting declaration) was served on the same people by the same means, along with a copy of this Proof of Service. All parties required to be served have been served.

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No. 03-836

Supreme Court, U.S.
FILED
JAN 12 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

COLORADO,

Petitioner,

v.

WADE MILLER,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

BRIEF OF COLORADO DISTRICT ATTORNEYS' COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF COLORADO DISTRICT ATTORNEYS' COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted on behalf of the Colorado District Attorneys' Council ("CDAC").[1] Petitioner and Respondent have consented to CDAC's filing of this brief. The correspondence reflecting consent has been filed in the office of the Clerk.

I. INTEREST OF THE *AMICUS CURIAE*

The Colorado District Attorneys' Council ("CDAC") is comprised of the offices of the elected district attorneys who serve in the twenty-two judicial districts in Colorado. CDAC's mission is to promote, foster and encourage an effective administration of criminal justice in Colorado. To that end CDAC provides centralized prosecution-related services to the district attorneys of the state including, among other things, training, legislative drafting and

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[1] No counsel for either party authored this brief in whole or in part. No person or entity, other than CDAC, made a monetary contribution to this brief's preparation or submission. *See* Sup. Ct. R. 37.6. The Eleventh Judicial District Attorney is counsel for Petitioner, and the Office of the Eleventh Judicial District Attorney is a member of CDAC. CDAC is funded primarily through assessments paid by the member offices. However, neither the Eleventh Judicial District Attorney nor his office has made any financial contribution to this brief's preparation or submission. The two other counsel on the brief for Petitioner, including counsel of record, are Assistant Attorneys General and are appointed as Special Deputies District Attorney regarding this matter. The Colorado Attorney General is not a member of CDAC, although his office does pay an annual assessment to CDAC primarily to cover the expenses of access to CDAC's statewide computer system. Neither the Attorney General nor his office has made any financial contribution to this brief's preparation or submission.

liaison, legal research, and management assistance. CDAC frequently represents the interests of its members and the people of Colorado as *amicus curiae* in the Colorado courts.

CDAC's members are charged with the duty of prosecuting state criminal offenses throughout Colorado. CDAC possesses and provides the statewide perspective of the entire prosecution community, and its members have a direct interest concerning the severe negative impact the decision below, *People v. Miller*, 75 P.3d 1108 (Colo. 2003), reproduced at Pet. App. a1-a31, will have on the truth-finding process in criminal trials and therefore on effective law enforcement, public safety and the public's respect for the law and administration of justice. CDAC submits this brief to illuminate both the manner and extent of the Colorado Supreme Court's faulty articulation and misapplication of the good faith exception to the exclusionary rule, and to argue that certiorari review is needed to alleviate the severe negative impact that court's error in federal constitutional law will have on the administration of criminal justice.

The petition presents two questions, the first concerning the Colorado Supreme Court's treatment of the staleness doctrine under the Fourth Amendment, and the second concerning that court's treatment of the good faith exception to the exclusionary rule. CDAC fully supports the Petitioner and its position with regard to the first question presented, and urges that certiorari review is needed as to that question for all the reasons set forth in the petition, but perceives no need to bring additional matter relevant thereto to this Court's attention. *See* Sup. Ct. R. 37.1. Accordingly, *amicus curiae* CDAC offers its assistance to this Court through treatment of the good faith exception question only.

II. SUMMARY OF THE ARGUMENT

The exclusionary rule is designed to safeguard significant Fourth Amendment interests from the dangers of unrestrained police actions. On the other hand, the "substantial social costs" of the exclusionary rule on the truth-seeking process – and therefore on protecting the public, imposing appropriate sanctions, and maintaining respect for the law and the administration of justice – are likewise significant. *United States v. Leon*, 468 U.S. 897, 906-07 (1984). This Court has struck the balance between these conflicting interests by restricting the exclusion of evidence "to those areas where its remedial objectives are thought most efficaciously served." *Id.* at 908.

This Court concluded that the exclusionary rule was unlikely to result in appreciable deterrence – and therefore it should not apply – when law enforcement officers obtain evidence "in objectively reasonable reliance on a subsequently invalidated search warrant." *Leon*, 468 U.S. at 922. This case involves the question of when an affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," *Leon*, 468 U.S. at 923, which was one of the four circumstances identified in *Leon* in which "the officer will have no reasonable grounds for believing that the warrant was properly issued." *Id.*

The Court should grant the writ because the Colorado Supreme Court has interpreted this language in a manner that all but eliminates the good faith exception itself. It has done so based on the dissent in *Leon*, rather than on the majority opinion and the cases relied on by the majority. It has inexplicably found official belief in the existence of probable cause to be entirely unreasonable despite the

fact that three dissenting colleagues on the court found that there was probable cause. In addition, this Court should grant the writ to clarify the meaning of this limitation on good faith and thereby alleviate difficulties frequently faced by lower courts.

If the opinion below is allowed to stand, the federal good faith exception will rarely apply in Colorado and in other jurisdictions persuaded to follow Colorado's lead. That would have the result that the substantial social costs of the exclusionary rule will be incurred despite the absence of any remedial, deterrent effect.

III. ARGUMENT

A. The Colorado Supreme Court Has, In Effect, Nullified the Good Faith Exception to the Exclusionary Rule.

The great extent to which the Colorado Supreme Court departs from established U.S. Supreme Court doctrine is apparent from a comparison of the underlying assumption of the Colorado court's good faith analysis with that of *Leon*. The opinion below states, "In the vast majority of cases where a substantial basis for determining probable cause does not exist, the police cannot rely on the good faith exception." (Pet. App. a14.) In contrast, this Court repeatedly indicated in *Leon* that it will usually be the case that the exclusionary rule will not apply to searches authorized by warrants later found to have been issued based upon insufficient affidavits.

The *Leon* opinion states, "[S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those *unusual cases* in which exclusion will further the purposes of the exclusionary rule."

Leon, 468 U.S. at 918 (emphasis added). It goes on to state that searches pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate *normally* suffices to establish that a law enforcement officer has acted in good faith in conducting the search. *Id.* at 922 (emphasis added). This Court said, "Our conclusion is that the [exclusionary] rule's purposes will *only rarely* be served by applying it" where "officers have relied on a subsequently invalidated search warrant." *Id.* at 926 (emphasis added).

The Colorado Supreme Court's decision not to apply the good faith exception in the "vast majority" of cases in which a warrant is ultimately found to have been issued without a substantial basis for probable cause[2] is a dramatic

[2] The Colorado court began its application of the good faith exception by referring to "cases where a substantial basis for determining probable cause does not exist." (Pet. App. a14.) It had earlier acknowledged that a "reviewing court should uphold the validity of a warrant if the affidavit accompanying the warrant creates a substantial basis for the conclusion that probable cause existed." (Pet. App. a6.) However, rather than applying this deferential standard, the court agreed with the trial court's conclusion that the warrant was not supported by probable cause. (Pet. App. a2, a3, a4, a14.) Therefore, both reviewing courts improperly based their suppression orders on their *de novo* determinations that the affidavit did not establish probable cause rather than determining whether there was a substantial basis for the issuing magistrate's conclusion that there was probable cause. *Cf. Illinois v. Gates*, 462 U.S. 213, 236 (1983). In addition, the court concluded that the officers could not have reasonably relied on the warrant because reasonable officers should know that there cannot be probable cause without relatively current information of illegal activity or the presence of contraband. (Pet. App. a16.) Thus, despite any language suggesting the contrary, the Colorado court's good faith analysis is in fact premised on a *de novo* determination of a lack of probable cause, as if that were the same as a determination that there was not a substantial basis for finding probable cause.

turn away from the good faith doctrine established in *Leon*.

B. The Colorado Court Developed Its Begrudging Approach to the Good Faith Exception By Inappropriately Relying on the *Leon* Dissent.

The *Miller* court quoted its prior decision in *People v. Leftwich* for its premise that good faith would not apply in the "vast majority" of cases in which a substantial basis for determining probable cause does not exist. (Pet. App. a14.) In *Leftwich*, the court relied on a dissent in *Leon* as the basis for this premise. *People v. Leftwich*, 869 P.2d 1260, 1270-71 n.12 (Colo.), *cert. dismissed*, 512 U.S. 1271 (1994) (quoting *Leon*, 468 U.S. at 958-59 (Brennan J., dissenting)).

The Colorado court relied on a portion of Justice Brennan's dissent where he severely criticized the majority decision in light of *Illinois v. Gates*, 462 U.S. 213 (1983) (in which Justice Brennan also dissented). The Colorado court quoted Justice Brennan's statement that "[b]ecause the two standards overlap so completely, it is unlikely that a warrant could be found invalid under *Gates* and yet the police reliance upon it could be seen as objectively reasonable; otherwise, we would have to entertain the mind-boggling concept of objectively reasonable reliance upon an objectively unreasonable warrant." *Leftwich*, 869 P.2d at 1270 n.12, quoting *Leon*, 468 U.S. at 958-59 (Brennan J., dissenting).

It is not suprising that the Colorado court's reliance on the *Leon* dissent led to an approach to the good faith exception that is diametrically opposed to the decision of

this Court's majority. The Colorado court has concluded that the good faith exception will rarely apply in precisely those situations for which it was designed. It has gutted the good faith exception recognized by this Court's majority based on a criticism of that holding in the dissent. The conflict between this Court and the Colorado court could not be more substantial.

C. This Limitation on Good Faith Applies to Flagrant Situations and Is Not To Be the Norm.

The *Leon* Court relied on *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975) (Powell, J. concurring in part) for the qualification on the good faith exception implicated in this case. *Leon*, 468 U.S. at 923. Justice Powell's analysis in *Brown* reveals that he meant this language to apply to "flagrant" Fourth Amendment violations.

Justice Powell recognized that "[a]ll Fourth Amendment violations are, by constitutional definition, 'unreasonable,'" but suppression of evidence will not serve "the deterrent purposes of the exclusionary rule" for all such violations. *Brown*, 422 U.S. at 609. He referred to when factors relied upon to make an arrest are "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" as the example at the extreme – the "flagrantly abusive violation of Fourth Amendment rights" where "the deterrent value of the exclusionary rule is most likely to be effective." *Brown*, 422 U.S. at 610-11. He contrasted that situation, at one extreme end of the spectrum, with those "'technical' violations of Fourth Amendment rights" at the opposite end of the spectrum "where, for example, officers in good faith arrest an individual in reliance on a warrant later invalidated or

pursuant to a statute that subsequently is declared unconstitutional." *Brown*, 422 U.S. at 610-11.

In *Brown,* officers broke into an apartment of an acquaintance of a murder victim, searched it, and arrested that person at gunpoint when he returned home, all in the absence of probable cause and for the purpose of questioning him as part of their homicide investigation. *Brown*, 422 U.S. at 592. Those facts and Justice Powell's explanation of his use of the language at issue here show that that language was limited to "flagrant" Fourth Amendment violations, that is, where the officers' actions were "so obviously inconsistent with what is right or proper as to appear to be a flouting of law. . . . " *See* Merriam-Webster's Collegiate Dictionary 441 (10th Ed. 2002).

The Colorado court was wrong to conclude that Justice Powell's language from *Brown,* as applied in *Leon*, encompassed "the vast majority of cases" in which a warrant is sought and approved, but later found to be factually deficient. All such mistaken judgments about probable cause may be unreasonable for constitutional purposes, but they are not flagrant constitutional violations, for which the exclusionary rule can be expected to have a deterrent effect. Justice Powell recognized as much in *Brown* and this Court did too in *Leon,* but the Colorado court did not in *Miller.*

D. The Colorado Court Misconstrued This Court's Concept of "Bare Bones" Affidavits to Support Its Severe Limitations on the Good Faith Exception.

The Colorado court appropriately linked the limitation on good faith involved here with "bare bones" affidavits.

(Pet. App. a10.) However, the court applied this phrase strangely, saying, "The affidavit in this case is a 'bare bones' affidavit regarding the existence of the crucial link between the place to be searched and current information." (Pet. App. a15.) Thus, the Colorado court uses "bare bones" to describe an affidavit later found to be insufficient in establishing any link ultimately deemed crucial in the calculation of probable cause.

The examples of "bare bones" affidavits in the decisions of this Court give a much different and more limited meaning to "bare bones" than that applied by the Colorado court. Those cases establish that "bare bones," like Justice Powell's language in *Brown*, refers to extreme examples of affidavits that are flagrantly deficient in factual support for the warrant. It is the obvious nature of the deficiency of an affidavit, and not merely an error about its sufficiency, that provides the basis for charging the officer with knowledge that the warrant should not be requested, and for expecting that suppression of the evidence will serve its deterrent purpose.

This Court had in earlier cases used "bare bones" as a label for affidavits that present only untestable conclusory statements, such that a magistrate cannot make an independent determination of probable cause and issuance of a warrant could constitute nothing but a mere ratification of the bare conclusions of others. Then in *Leon* the Court looked to those earlier cases when discussing "bare bones" affidavits, as it also had done in *Gates*. *Leon,* 468 U.S. at 915 (citing *Aguilar v. Texas*, 378 U.S. 108, 114-15 (1964), *Giordenello v. United States*, 357 U.S. 480 (1958), and *Nathanson v. United States*, 290 U.S. 41 (1933)); *id.* at 923 n.24 (referring to *Whiteley v. Warden*, 401 U.S. 560 (1971) as involving a "bare bones" affidavit). *See Gates*,

462 U.S. at 239 (also citing *Nathanson* and *Aguilar).* The meaning of "bare bones" is thus to be found in the facts of those earlier cases.

The affidavit in *Nathanson* contained only "[a] sworn statement of an affiant that 'he has cause to suspect and does believe' that" contraband was on the premises.[3] *Gates*, 462 U.S. at 239; *Nathanson*, 290 U.S. at 44. The affidavit in *Aguilar* stated only that "[a]ffiants have received reliable information from a credible person and do believe" that drugs were stored in a home.[4] *Gates*, 462 U.S. at 239 (alteration in original); *Aguilar*, 378 U.S. at 109. The sworn complaint in *Giordenello* stated only that "Giordenello did receive, conceal, etc., narcotic drugs, to wit: heroin hydrochloride with knowledge of unlawful importation. . . ."[5]

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[3] The full basis for the warrant in *Nathanson* was: "Whereas said Francis B. Laughlin has stated under his oath that he has cause to suspect and does believe that certain merchandise, to wit: Certain liquors of foreign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson said premises being described as a 2 story frame dwelling located at 117 No. Bartram Ave." *Nathanson*, 290 U.S. at 44.

[4] The full basis for the warrant in *Aguilar* was: "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." *Aguilar*, 378 U.S. at 109. The dissent said that the information supporting the warrant also included that the officers "kept the premises of petitioner under surveillance for about a week." *Aguilar*, 378 U.S. at 116 (Clark, J. dissenting).

[5] The full basis for the warrant in *Giordenello* was: "The undersigned complainant [Finley] being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas,

(Continued on following page)

Giordenello, 357 U.S. at 481. The sworn complaint in *Whiteley* only stated that the named "defendants did then and there unlawfully break and enter a locked and sealed building."[6] *Whiteley*, 401 U.S. at 563.

As these cases demonstrate, this Court has consistently used "bare bones" to describe documents supporting the warrant that stated only bare conclusions of the officer or the informant, without providing any facts from which the magistrate could make an independent determination of probable cause. In contrast, the Colorado Supreme Court perceives only bare bones once it has declined to draw a particular intermediate conclusion from the totality of the facts in the affidavit – in this case, that the evidence of criminal activity is sufficiently current. It does so even where the affidavit contains much more than just the officer's bare conclusion on the existence of probable cause.[7]

Veto Giordenello did receive, conceal, etc., narcotic drugs, to wit: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code." *Giordenello*, 357 U.S. at 481 (alteration in original).

[6] The full basis for the warrant in *Whiteley* was: "I, C.W. Ogburn, do solemnly swear that on or about the 23rd day of November, A.D. 1964, in the County of Carbon and State of Wyoming, the said Harold Whiteley and Jack Daley, defendants did then and there unlawfully break and enter a locked and sealed building [describing the location and ownership of the building]." *Whiteley*, 401 U.S. at 563 (alteration in original).

[7] The affidavit here contained three and a half single-spaced, typed pages implicating the defendant and his home in the manufacture of methamphetamine. (Pet. App. a18, Justice Coats, dissenting; Pet. App. a25-a31.)

As shown by the cases this Court cited in *Leon*, the limitation on good faith implicated here should be confined to extremely deficient affidavits, such as those "bare bones" ones where the officer presents only the conclusion that there is probable cause with no supporting facts. Such circumstances establish why the reasonably well-trained officer should have known that he should not rely on the warrant and why suppression of the evidence should serve to deter. The Colorado court has failed to recognize what this Court meant by "bare bones" and therefore has failed to properly restrict this limitation on good faith to flagrant situations where the exclusionary rule will serve its deterrent purpose.

E. The Reasonable Analysis of the *Miller* Dissent Supports the Good Faith of the Officer.

The Colorado court also failed to accommodate in its approach the fact that "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause." *Leon*, 468 U.S. at 914. This Court stated that "the opinions of the divided panel of the Court of Appeals" made it clear that the affidavit in *Leon* itself "provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause," thereby supporting the objective reasonableness of the officer's belief in the existence of probable cause. *Leon*, 468 U.S. at 926.

The fact that reasonable minds can differ over probable cause is perhaps most apparent in a case like this one, in which only a bare majority of the state supreme court found the affidavit deficient and three justices found that same affidavit to be sufficient. It is, at best, perverse

to find the police officers "could not have harbored an objectively reasonable belief in the existence of probable cause," *id.*, or that official belief in the existence of probable cause is "entirely unreasonable," *id.* at 923, where a well-reasoned dissent of three supreme court justices demonstrates that there is a reasonable basis for believing in the existence of probable cause.

The court below did not explain why the dissent did not provide a basis for concluding that the officer was objectively reasonable in believing the warrant to be valid. It did say, however, that objective good faith is considered as of the time police apply for the warrant, so that "the fact that a magistrate acted favorably upon a warrant request is of no moment in the determination of whether the officer acted with objective reasonableness." (Pet. App. a9, citing *Malley v. Briggs*, 475 U.S. 335, 345 (1986)). Perhaps from this the court assumed that the well-reasoned dissent did not matter because it came after the officer applied for the warrant. Such a reliance on *Briggs* would be misplaced.

Briggs involved a question of immunity for a civil claim that was based on an arrest under a warrant where the charges were subsequently dropped when the grand jury did not return an indictment. *Id.* at 338-39. This Court held that the fact that a judge approved the warrant did not control whether the officer was immune, construing *Leon's* standard in this context to be equivalent to "whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Briggs*, 475 U.S. at 345-46.

This standard does not preclude consideration of a subsequently written appellate opinion of dissenting justices, or even of arguments subsequently considered as reasonable but rejected as less persuasive, in determining the objective reasonableness of the application for a warrant. A belief in the existence of probable cause cannot be "entirely unreasonable" on an objective basis, *Leon*, 468 at 923, if there are reasonable arguments that can be made in support of its existence. Likewise, an officer could not "know" that an affidavit does not establish probable cause, *Briggs*, 475 U.S. at 345-46, when the considered review of that affidavit by the state's high court leads to such a split on that precise question.

Court-ordered suppression of reliable evidence through faulting a law enforcement officer as harboring an entirely unreasonable belief when there is demonstrable, even published, legal support for that belief, is particularly likely to engender that disrespect for the law and for the administration of justice which the *Leon* Court sought to avoid by creating the good faith exception. *Leon*, 468 U.S. at 908. The Colorado court erred seriously in failing to acknowledge that a difference of opinion within its own ranks on the sufficiency of the affidavit is substantial, perhaps controlling, support for the objective reasonableness of the officer's belief in the validity of the warrant.

F. The Application of the Limitation on Good Faith Considered in this Case Is in Need of Clarification by this Court.

In the 19 years since *Leon* was decided, lower courts have frequently been confronted with the question presented here of when the good faith exception to the exclusionary rule is not applicable because a warrant is based

on "an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'" under *Leon*, 468 U.S. at 923. *See* 1 Wayne R. LaFave, *SEARCH AND SEIZURE, A Treatise on the Fourth Amendment,* § 1.3(f) at 84 (3rd Ed. 1996) (describing this question as "a most difficult issue" that "continues to be frequently litigated").

This exception to good faith cries out for further clarification because, as this case shows, its application can be very problematic. As the Court said in *Gates*, "There are so many variables in the probable cause equation that one determination will seldom be a useful 'precedent' for another." *Gates*, 462 U.S. at 238 n.11. As a result, even very well-trained officers will not necessarily know when there are sufficient "indicia of probable cause." Furthermore, the Court also recognized that "[r]easonable minds frequently may differ on the question of whether a particular affidavit establishes probable cause." *Leon*, 468 U.S. at 914. Even high court justices can disagree, as they did in this case, on whether there is a substantial basis for a determination of probable cause.

Under the Colorado approach, neither of these facts matter, because if a reviewing court ultimately concludes, even by a closely divided vote, that the magistrate was wrong in the determination of probable cause, the officer will be deemed unreasonable in "the vast majority of cases," so that good faith does not apply. Objective reasonableness in this context cannot depend so on *post facto* majority rule without severely changing the meaning of "reasonable."

The problem presented is how to recognize those affidavits where the "indicia of probable cause" are so lacking that the officer can be charged with knowing that the warrant should not be requested, comparable to the other, more obvious limitations on good faith. These other limitations are: when the officer misleads the magistrate, as in *Franks v. Delaware*, 438 U.S. 154 (1978); when the magistrate wholly abandons the neutral and detached judicial role, as in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); and when the officer is responsible for a warrant that is facially deficient, in contrast to *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). *Leon*, 468 U.S. at 923. It is not comparable to these situations to be wrong about whether evidence of drug manufacturing at a particular place has become stale for Fourth Amendment purposes.

The Colorado Supreme Court's decision in *Miller* provides an opportunity to correct Colorado's significant departure from established good faith doctrine and at the same time to provide greatly needed clarification of this important issue of Fourth Amendment doctrine.

IV. CONCLUSION

This Court should grant the writ in order to attend to the substantial departure by the Colorado Supreme Court from Fourth Amendment doctrine and to provide guidance to Colorado and to other jurisdictions on how to determine when an affidavit is "so lacking in indicia of probable

cause as to render official belief in its existence entirely unreasonable."

Respectfully submitted,

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